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IN THE

Supreme Court of the United States

October Term, 1962

No. 728

CHARLES SCHIFFMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CHARLES SCHIFFMAN,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Charles Schiffman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on November 8, 1962.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1962. On December 7, 1962, Mr. Justice John M. Harlan granted an order extending the time of the petitioner to file his petition for a writ of certiorari to and including January 7, 1963. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically raised by the petitioner Charles Schiffman, are:

1. Whether the Government proved the existence of the narcotic drug charged in the substantive counts of the indictment?

2. Whether the Trial Court improperly instructed the jury to commingle evidence received subject to connection on the conspiracy count, and to weigh such evidence as competent evidence admissible against the various substantive counts with which the defendants had been charged?

3. Was the appellant Schiffman prejudiced by the Trial Court instructing the jury that the defendant Tandler did not take the witness stand because he could not be compelled to incriminate himself?

4. Should the defendant's motion to dismiss the indictment on the grounds that the Grand and Petit juries had been improperly selected, been granted?

5. Should the evidence of the arrest of the Government witnesses Rinaldo and Palmieri on October 21, 1960, and their later disclosures, all of which were the fruit of the poisoned tree, been suppressed as having been obtained by and through wire tapping?

D. The Statutes

The statutes involved are: United States Code, Title 21, Sections 173 and 174.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

A 30 count indictment was returned against the petitioner and 19 other defendants alleging the crime of conspiracy to violate Title 21, Sections 173-174 of the U. S. Code and separately charged various defendants with substantive violations.

The petitioner together with 10 co-defendants were tried and found guilty as charged after a two month trial and thereafter sentenced to imprisonment. The petitioner was sentenced to twenty-five (25) years imprisonment, which he is now serving.

On appeal to the United States Court of Appeals for the Second Circuit, the conviction of the petitioner as well as all other defendants were affirmed. The trial of the case

took two months and the typewritten transcript totalled more than 8000 pages.

F. Reasons for Granting Writ

ONE

A. The Government failed to prove the existence of the narcotic drug charged in the substantive counts of the indictment.

In order for the Government to prove any crime, all of the necessary and material elements must be proved beyond a reasonable doubt.[1] If there is a failure of proof in regard to any of those elements, then as a matter of law the guilt of the defendant has not been proved. Where the offense charged is a substantive violation of the Narcotic Control Laws, Sections 173 and 174 of Title 21, United States Code, a conviction may not be obtained where the Government fails to prove the existence of the narcotic. The petitioner herein urges that such a failure of proof prevails in the instant case.[2]

The facts here are that the principal witness, Salvatore Rinaldo, received packages of a white powder at various times. After receipt of the packages, he proceeded to heat a sampling of powder obtained from one or more, but not all of the packages. He also treated some of the powder

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1. *Hancey* v. *United States*, 108 F. 2d 835 (10th Cir., Utah, 1940).

2. "The burden of proof to establish the commission of a crime and every essential element thereof rests upon the prosecution is elementary and needs no citation of authorities." *Drossos* v. *United States*, 2 F. 2d 538, 539 (9th Cir. 1924); *Christoffel* v. *United States*, 338 U. S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826; *Minner* v. *United States*, 57 F. 2d 506 (10th Cir. 1932).

obtained from one or some of the packages, but not all, with nitric acid, and observed a certain color reaction. Just before the conclusion of its case, the Government called to the stand two chemists employed for many years by the Bureau of Narcotics, who testified that in their opinion the results of the tests as above described would give rise to a *suspicion* that heroin was present in the powder (D. App. 81a-90a). In order for either to testify that in his opinion that powder was heroin, further tests would have been required. Emphasis belongs on the assertion of both experts that all that would arise in their minds would be suspicion of the existence of the alleged narcotic drug.[3]

In addition, the Government urged that the white powder with which Rinaldo allegedly dealt, was heroin, and that the chemists called on their behalf did not know of any substance other than heroin which would give the described

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3. "*By Mr. Krieger*:

Q. Mr. Milos, assume, one, that you put the white powder on top of an upturned cup and dropped some unspecified amount of an unknown dilution of nitric acid on that white powder and it turned from yellow to green in the course of about ten minutes. Then you took another sample of the white powder and inserted it in the glass tubing and tied it to the thermometer, as I described to you, and heated it to roughly 240 degrees Centigrade. Would you as an expert state the white powder from which those two samples were taken was heroin? A. Well, I could not say that it was heroin, but I would strongly suspect it might me. But I would want to further investigate" (D. App. 88a-89a).

"*By Mr. Brodsky*:

Q. Mr. Goldman, assume that a nitric acid test was performed on white powder and that a thermometer test or boiling point test was performed on the same sample of a white powder, could you give any opinion as to whether or not the white powder is heroin? A. The most I could say with the results of those two tests is that the substance might possibly be heroin hydrochloride. I could not say definitely without performing additional tests" (D. App. 90a).

reactions. The Government, therefore, proceeded in negative fashion seeking to prove the affirmative. This could not be done upon the facts adduced at this trial as the testimony of the expert witnesses did not exclude all other substances. Mr. Milos testified that he had tested only hundreds of both organic and inorganic compounds in his lifetime as a chemist, and conceded that there were thousands upon thousands of organic compounds alone, with which he had had no experience.[4]

Simply stated, but most urgently pressed, is the contention that under these facts the Government has failed to prove its case insofar as the substantive violations of the law are concerned. Where the experts in their opinion can only surmise, speculate, and suspect as to the existence of a material fact, then certainly the jury could do no more than the same. The cases are legion, the presumption of law is basic, and there can be no quarrel at this late date in the history of our jurisprudence that a conviction can not be sustained where a jury is left to speculate or to guess at a defendant's guilt. There must be a rational basis for a

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4. *"By Mr. Krieger*:

Q. You can't foreclose it, can you? You can't foreclose the existence of compounds which when subjected to concentrated nitric acid would go through the yellow-and-green color changes? A. No, no—

Q. Thank you. A. I don't know. I am speaking within the framework of my own experience.

Q. Oh, yes, of course. A. The organic field comprises thousands upon thousands upon thousands of different substances and I have never tested those.

Q. Pardon? A. I have never tested thousands of them, so I can't say what reaction would go on.

Q. Oh, I see. Then you are limiting your answer in regard to the empirical nature of this nitric acid test just to the comparatively small number of samples with which you have had experience? A. That is right" (D. App. 89a).

finding by a jury.[5] A judgment must be supported by facts. Under the present state of this case, the jury is asked to infer a fact from a suspicion and deduce guilt. A classic example of pyramiding inference upon inference then exists. Predicating proof of guilt upon such questionable syllogism is repugnant to our standards of due process.

The existence of the narcotic drug, of course, can be proved without the production of the drug. In any such case there has been clear, definitive, testimonial proof of a singularly probative nature that the drug did exist as a fact. In one case, a chemist employed by the Bureau of Narcotics appeared to testify that he had taken samplings from a scale, had analyzed those samplings and in the process of analysis, the samplings were destroyed. As a result of his analysis, he was able to testify that the samplings contained heroin.[6] There also are factual situations where an addict testified that he used the powder and found it to be heroin.[7] In the instances hereinabove cited, a witness was produced as an expert and testified to a fact. It is most pertinent that at no time was the principal witness, Rinaldo, qualified to render an opinion as to the powder in which he was alleged to deal, nor was an effort made to qualify him as an expert in such regard. The Government basically relied upon the testimony of the two chemists, and the two chemists did not testify as to the narcotic's existence. The submission of the question of the existence of the narcotic drug to the jury resulted in verdict by guess,

5. *Cooper* v. *United States*, 218 2d 39 (D. C. Cir. 1954).

6. *United States* v. *Adelman*, 107 F. 2d 497 (2nd Cir. 1932).

7. *United States* v. *Tramaglino* 197 F. 2d 928 (2nd Cir. 1952); *Pennachio* v. *United States*, 263 F 66 (2nd Cir. 1920).

prejudice, and of personal disfavor and distaste for a particular crime.[8]

The Court of Appeals in its opinion at page 251 stated "a conviction on similar evidence was upheld in *Toliver* v. *United States*, 224 F. 2d 742, 745 (9th Cir. 1955)." The petitioner respectfully submits that the two fact patterns are markedly dissimilar. *Toliver* does not stand for the proposition that, where the narcotic is not produced in Court and no expert or "user" testifies that the substance transferred was a narcotic, the substance is proved to be a narcotic, beyond a reasonable doubt.

In *Toliver* the Government witness Abe Brown testified that he had been a "user" of narcotics; this is expert testimony. In addition he testified only to what *he had transferred;* the exhorbitant prices that had been paid to *him;* the fact that the substance transferred was a powder. The circumstantial evidence that was used to prove the existence of the narcotic, were transactions only involved with the Defendant; unlike this case where transactions involving other defendants and other counts were used to establish that what the petitioner transferred at another time and at another place was a narcotic.

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8. In *Evans* v. *United States*, 257 F. 2d 121 (9th Cir. 1958), Josephine and William Evans were convicted under a four count indictment involving possession of heroin, and conspiracy to unlawfully sell. . . . The Court in reversing all counts as against one, and one count as against the other, in the face of considerable circumstantial evidence, stated at Page 126:

> "It is no doubt true that the evidence as to Williams' association with Josephine and as to his own past record of convictions gives rise to suspicion that he conspired with Josephine, but suspicion, however strong, is not proof and will not serve in lieu of proof."

B. The Trial Court improperly instructed the jury to commingle evidence received subject to connection on the conspiracy count, and to weigh such evidence as competent evidence admissible against the various substantive counts with which the defendants had been charged.

This Point One-A, however, was only one facet of a surface reflecting irreparable injury and prejudice upon the petitioner. Such evidence as might tend to prove the existence of transactions in contraband in a conspiracy prosecution, and clearly hearsay to the petitioner, was deemed binding upon him as a result of improper instructions to the jury.

The Government submitted amongst others, Request To Charge, Number 36, wherein they sought to catalogue what circumstantial evidence should be considered by the jury in determining whether or not heroin was actually possessed, transported, or dealt with as charged in the substantive counts of the indictment (D. App. 238a-240a; Petitioners Appendix C). Objection was made to the proffered instruction. The Court appreciated the thrust of defendant's objection and commented that each count must be considered separately by the jury, and that the evidence as to each count must be considered separately by the Jury. Such occurred in the course of colloquy when the Court was ruling upon Requests To Charge (D. App. 232a-235a; Petitioners Appendix C).

However, the Court otherwise instructed the jury in that they were charged to consider almost all of the evidence introduced in the case in determining whether, in a specific count, the circumstantial evidence was sufficient to prove

the existence of the narcotic drug.[1] This instruction was given to the jury without affording to the petitioner the benefit of analyzing with meticulous care the evidence as to each defendant. *United States* v. *Buffalino*, 285 F. 2d 408 (2nd Cir. 1960).[2] The effect of this is that the jury was instructed that in determining the guilt of Schiffman under the substantive counts of the indictment, they should weigh evidence relating to other substantive counts and to other defendants as well as to transactions not involving the appellant Schiffman.[3] As an instance, the attention of the jury was directed to cash payments not made, or involved, in the substantive counts charged against the petitioner, as well as conversations between Rinaldo and other individual defendants at times and places not involved in the specific substantive counts similarly charged against the petitioner, (D. App. 185a-8a). Admissions laid at the doorstep of other defendants in other substantive counts were deemed by the Court to be competent evidence to be utilized in the determination of all substantive counts[4] (D. App. 170a-6a). Great harm was done when the Court directed that the jury consider that the principal Government witness, Ri-

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1. The particular portion of the charge of Judge Herlands against which this argument is raised, is set forth in the appellants' appendix, 155a-168a in the United States Court of Appeals.

2. "It is incumbent on Trial Judges, in deciding whether the Government has made a sufficient case to go to the jury, to analyze with meticulous care the evidence as to each defendant. When this is not done, it is the duty of the Appellate Court to Act." *United States* v. *Buffalino*, 285 F. 2d 408 (2nd Cir. 1960).

3. *Ong Way Jong* v. *United States*, 245 F. 2d 392, 395 (9th Cir. 1957).

> "The excellent Trial Judge made the mistake of considering a mass of evidence which was only admissible against Wee."

4. *Krulewitch* v. *United States*, 336 U. S. 440, 453, 69 S. Ct. 716, 723.

naldo, was arrested on October 21, 1960, in possession of approximately ten (10) kilograms of heroin; that the Government's chemists had testified that the substance then in Rinaldo's possession was heroin; and that there was heroin in Rinaldo's constructive possession in his home, and in the home of his sister; and that all of the foregoing was evidence that at other times and at other places Rinaldo did participate in narcotics transactions with the other defendants. The occasion of Rinaldo's arrest on October 21, 1960, was some two weeks after the last alleged substantive violation of law by the petitioner Schiffman. The Trial Court recognized that a problem existed in that the jury might be misled by a mass of evidence, and the following colloquy took place prior to the charge submitted to the jury.

> "The Court: Well, the *Buffalino* case requires an individualization and compartmentalization of the proof, defendant by defendant and count by count. Now, the point of Mr. Krieger's objection is that you can not have a spilling over from count to count of the evidence unless the proof applies to each count. Now, if a particular transaction took place, let us say, in July, 1959, evidence concerning what took place in April, 1960, would not be applicable to a transaction in July, 1959. Moreover, if different defendants are involved in different counts, the testimony about two or three defendants in one count cannot be used respect to different defendants in other counts. Is that right?
>
> Mr. Brodsky: Yes, I agree with that as a proposition of law" (D. App. 98a-99a).

The aggregate of this submission to the jury is that evidence which may well have been admissible only to prove

a conspiracy was employed to prove a substantive count. The incalculable harm flowing from such instruction is that it is almost impossible for a jury not to arrive at a verdict of guilty as to the substantive count; and once having arrived at a guilty verdict there, they must return a guilty verdict as to the conspiracy count. The logic of such a position is based upon the fact that the same evidence is given to the jury to determine both crimes. Of course, in a given case, such a situation could exist; here, however, such a situation did not exist. In the substantive counts charged against the petitioner Schiffman, the principals and aiders and abettors are the petitioner Schiffman, Tandler, the Government witness Rinaldo and the untried defendants Caruso and Taubman. Evidence adduced against any other defendant or person not a party to the count is incompetent and inadmissible against the petitioner Schiffman and Tandler, insofar as the substantive counts charged against them are concerned.[5] Yet, the Trial Court below charged otherwise as indicated above. The *Buffalino* case took pains to instruct the Trial Court as to its obligations in regard to the marshalling of the evidence. The petitioner contends that in the Trial Court, these clear, unequivocal directions were rendered nugatory. The jury in this case considered at specific instruction, evidence not admissible against the petitioner in determining guilt.[6] This evidence,

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5. *Nash, et al.* v. *United States*, 54 F. 2d 1006 (2nd CCA, 1932); cf. Bartlett v. U. S., 166 F. 2d 920; Byford v. U. S., 185 F. 2d 171; U. S. v. Pugliese, 153 F. 2d 497.

6. A review of the portion of the Trial Court's charge to which this point on appeal is directed, illustrates that the testimony of the other defendants' conversations with the co-conspirator, Rinaldo, and their dealings with Rinaldo are all unequestioned hearsay as to the petitioner, insofar as the substantive counts charged against him are concerned. Therefore, hearsay of the grossest and most damaging

as is apparent, was not of such sort or nature as to be one leaf in a windstorm.

In its charge on the circumstantial evidence adduced to prove the existence of the narcotic drug in all of the substantive counts, the Court propounded a theory which smacks of putting the cart before the horse. The Court charged as follows:

> "5. The Government alludes to the fact that none of the alleged purchasers of the substance complained that the substance which they had purchased was different from that which they had contracted to buy. The defense denied any such transaction" (D. App. 156a).

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sort was submitted to the jury as substantive evidence of the crime charged.

In *Cook* v. *United States*, 138 U. S. 157 at 184, 5, the Court stated:

> "And the Court in its charge said to the jury, 'the instructions as given above are limited, so far as the evidence is concerned, by the following instructions: the portions of Attorney General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being the attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not made to said Bradford, you are to disregard the same. But, if you believe from the evidence that they were so made to said Bradford, then you are to consider them as evidence, but only to such parties by whom they were made.'
>
> The jury was thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at and participated in, the killing. The representatives of the Government, in this Court, frankly conceded, as it was their duty to do, that this action of the Court below was so erroneous as to entitle the defendants to a reversal."

It is also interesting to note that the Solicitor General appearing on behalf of the United States in this case was William Howard Taft.

There was no proof submitted at this trial as to whether there was approval or disapproval of the substance allegedly purchased or transported. The absence of complaint is inherent in the denial of the defendants as to any narcotics dealing with the witness, Rinaldo.

The purpose of this charge was to aid the jury in determining whether a narcotic drug had been actually transported or sold to any one of the defendants. By the instruction that the jury should inquire as to whether a defendant had complained that he did not receive a narcotic drug, the Court referred the jury's attention, of necessity, to the fact that a *transaction* had actually occurred. This was a fact for the jury to determine in the first place. If the jury had been instructed to determine whether a transaction had occurred, and then had been instructed that from the fact of such transaction, certain inferences could be drawn, then a slightly different situation might prevail. That, however, would still leave the defendant peering into the looking glass, as Alice in Wonderland, for his denial of the transaction would be considered by the jury, pursuant to this instruction, as an admission that he had, in fact, purchased heroin. The argument runs full circle. By denying the transaction, the defendant is deemed to have admitted the receipt of heroin, which is the heart of the transaction. His denial becomes an admission.

The petitioner respectfully stresses that the fact that in this portion of the charge the Trial Court constantly referred to the evidence as being that which the Government alludes to, or that which the Government claims, or that which the Government refers to, does not remove or lessen the burden of the Trial Court to charge what

is evidence in the first place, and secondly, to compartmentalize the evidence to which it refers in its charge.[7] Government's Request To Charge, Number 36, was objected to in its entirety by defense counsel. The Court in substance charged Government's Request Number 36 in the language selected and chosen by the Government. A jury listening to the charge of the Court, however, does not differentiate between arguments and nuances of argument, insofar as the Judge's instructions are concerned. The jury as is most appropriate, listens most carefully to the instructions of the Court, and pays the greatest heed to the Court.[8] An error in fact, an error in cataloging a fact, an error in marshalling of the evidence, an error in presentation of the evidence by the Court to the jury redounds to the greatest injury of the petitioner.

The Court below recognized the problem inherent in the confused situation resulting from unwieldly trials of this type.

> "In a trial of this dimension, each juror is faced with a difficult task in compartmentalizing the evidence with regard to each particular defendant and keeping clearly in mind the full circumstances of each transaction. It is the function of the judge, in his instructions to the jurors, to marshal the evidence that they have seen and heard presented such that justice may be meted out to the individual rather than to the group. Our concept of criminal respon-

7. "It was the Judge's duty to instruct the jury correctly, regardless of what theory any party might urge upon him in offering instructions." *Carrado v. United States*, 210 F. 2d 712 (D. C. Cir. 1953).

8. *Brasewell et al. v. United States*, 200 F. 2d 597, 802:

> "'Jurors properly bear great respect for the Judge conducting the trial, and 'his every word and act are calculated to have a strong influence upon them'." (Citing cases)

> sibility, like our concept of moral responsibility, is rooted in the individual, his intentions, his motives, and his conduct. The trial judge, therefore, has the burden of impressing upon the jury the need for judging each defendant separately upon each separate substantive count charged in the indictment" (No. 99, October 1962, Slip opinion U. S. Court of Appeals, p. 251).

Petitioner contends that any view of the charge of the trial court addressed to this proposition only leads to the conclusion that he, the petitioner, was grievously prejudiced. The jury was instructed that they:

> "might consider in determining whether a given defendant had possession of or had imported the narcotic drug as charged in each substantive count: (1) Rinaldo's testimony that he had personally tested samples of the powder from each shipment; (2) the secrecy and deviousness with which the transactions were handled (*i.e.*, false-bottomed trunks, use of lining in the blankets, code words, etc.); (3) the fact that the substance in which they were dealing was a white powder; (4) the high prices paid in cash for the substance; (5) the lack of complaint on the part of the purchasers; (6) descriptive language used by certain of the defendants in connection with certain transactions; (7) the white powder in evidence which the United States chemist testified was heroin hydrochloride" (App. A, p. 23a).

Storm warning pennants slapped in the freshening wind as:

> "That portion of the charge on circumstantial evidence of narcotics most likely to result in harmful side effects to the defendants was the following:

> "6. The Government claims that its witnesses, Palmeri and Rinaldo, testified as to admissions by *certain* of the defendants that they were dealing with narcotics in connection with *certain* transactions." (App. A, p. 24a).

The conceded ambiguity in respect to this item "6" as well as the others, it is respectfully alleged, was not cured by instructions given previously or thereafter as they dealt with findings of guilt in respect to the separate counts, *not with the evidence to be considered in making such finding.* The Trial Court charged that in the consideration of each count, all seven (7) items *supra*, may be considered. Therefore while:

> "His instructions to the jury were replete with admonitions that 'you must be convinced beyond a reasonable doubt that the substance involved in each of such substantive counts was a narcotic drug . . . .'" (App. A, p. 24a).

his admonitions were not directed to the evidence.

Any defendant in a multiple defendant case is entitled to the full measure of protective quarantine found in precise compartmentalization of evidence.

> "In short the proof was carefully compartmentalized as to each petitioner . . . moreover, the Judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive counts." *Schaffer v. United States*, 362 U. S. 511, 4 L. Ed. 921, 925.

Therefore, the conclusion must be reached that a two headed monster was born in the prosecution of this case. First, there was a failure of proof as to the existence of the narcotic drug. Instead of taking the consideration of those substantive counts away from the jury, their submission was accompanied by a conglomeration of incompetent, inadmissible, inflammatory and highly prejudicial evidence. Second, the final inglorious end was that upon consideration of the wrongfully submitted, wrongfully instructed substantive counts, the jury's mind became so inundated with narcotics and narcotics transactions, that there could have been no calm consideration of the conspiracy count. The petitioner respectfully submits that the trial jury was hopelessly misled by the Court below, and that, therefore, the defendants were deprived of a fair trial.

TWO

The error that the Trial Court committed in instructing the jury that the defendant Tandler did not take the witness stand because he could not be compelled to incriminate himself prejudiced the petitioner Schiffman.[9]

The testimony adduced at the trial, if believed, was that Schiffman and Tandler worked together in illegal narcotics transactions. Apparently, Tandler was allegedly employed as a courier by Schiffman. The testimony linked both.

Schiffman took the witness stand in his own defense. He denied each and every charge leveled against him through

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9. "To secure a new trial, they must show that the denial of Glasser's constitutional rights prejudiced them in some manner, for where error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his co-defendants to a new trial depend upon whether that error prejudiced them." *Glasser* v. *United States*, 315 U. S. 60, at pages 76 and 77 (Citing cases).

the indictment, and further denied any narcotics transactions at all with Rinaldo. He denied the meetings alleged by Rinaldo with Tandler, and denied ever seeing Tandler at any track at any time.

Considering the apparent proximity of interest between Schiffman and Tandler, the effects of a charge couched in the language used by the Trial Court can be deemed to be an unfair comment upon the credibility of Schiffman. If the jury were to consider that Tandler did not take the witness stand because of his fear of incriminating himself, it followed that the jury must of necessity have believed that Tandler was concealing incriminating evidence. The next step in the logical process is that Schiffman was lying, and if Schiffman were lying, then Rinaldo had to be telling the truth. Ergo, if Tandler were to have taken the witness stand, he would have contradicted Schiffman.

Therefore, the petitioner Schiffman respectfully contends that the error committed in regard to the right of Tandler not to be a witness, prejudiced him. *Glasser v United States, supra.*

THREE

The petitioner's motion to dismiss the indictment on the grounds that the Grand Jury had been improperly selected should have been granted and the challenge to the array of the petit jury because of its improper selection likewise should have been granted.

Prior to trial, the defendants moved to dismiss the indictment on the grounds that the Grand Jury was illegally selected. Cited as authority therefor, and in support of its proposition, was the comparatively recent amendment to

the Civil Rights Law, to wit; *28 U. S. C., Section 1861*. The enactment of this statute in 1957 did away with the imposition of State standards upon the competency, or availability, or ability of a citizen of this country to serve as a juror in federal proceedings. The statute in its entirety is set forth in the margin.[10] The Jury Commissioner for the Southern District of New York did not alter his procedure in selecting jurors to serve on both the petit and the Grand Jury as a result of the enactment of the statute. He proceeded to select jurors in the same manner regardless of Congressional mandate. The findings of fact and conclusions of law made by Judge Herlands so indicate (D. App. 43a-46a).

The means of selection employed by the Jury Commissioner of the Southern District was by choosing allegedly at random, prospective jurors from the most recent presidential voting lists of the Counties of New York, Bronx and Westchester. Concededly, the population of those three counties in 1960, the year of the return of the indictment in this case, was 3,931,987. However, there were only 1,770,852

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10. Section 1861. Qualifications

"Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

"(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

"(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

28 U. S. C. Section 1861.

voters registered in the three counties. Additionally there were 1,182,287 people who were under 21 years of age, and otherwise ineligible to jury service. Therefore, there were roughly 1 million people who were arbitrarily excluded from ever serving upon a United States jury by virtue of the means of selection employed by the Jury Commissioner.

Applying for the sake of argument, the rules enunciated in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; and *Ballard* v. *United States*, 329 U. S. 187, that a legally cognizable class must be excluded from jury service in order for the defendant to successfully maintain his claim that his right to an impartial jury drawn from a cross section of the community has been violated, it appears that where approximately thirty (30) per cent of the eligible jurors are arbitrarily excluded, legally cognizable classes must fall within. It is urged that the Court take judicial notice of the constant campaign to increase the number of citizens registering in presidential elections, that it has been constantly maintained that a large segment of our population voluntarily disenfranchises itself, and that therefore, a presidential voting list would not in fact give a true cross section of the community.

Further than that, the presidential voting list for the three counties above stated is drawn pursuant to conditions and qualifications imposed in accordance with Section 150 of the Election Law of the State of New York.[11] Section 150

11. Section 150. 'Qualification of voters

A person is a qualified voter in any election district for the purpose of having his or her name placed on the register if he or she is or will be on the day of the election qualified to vote at the election for which such registration is made. A qualified voter is a citizen who is or will be on the day of election twenty-one years of age, and who has been an inhabitant of the state for one year next preceding the election,

of the Election Law differs markedly from Section 1861 of Title 28. Thus, the Jury Commissioner has imposed conditions of selections not authorized by law. If he, himself, wilfully did not impose these conditions, his use of the presidential voting list meant that there had been an unlawful delegation of his authority to select jurors to the Board of Elections of the three countries herein involved. It is respectfully submitted that such a process of selection baldly violates a Congressional mandate as to the conditions and qualifications to be employed in the selection of jurors comprising the panels for the Grand and Petit juries in this district.

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and for the last four months a resident of the county, city or village and for the last thirty days a resident of the election district in which he or she offers his or her vote, provided, however, that in any election district in which registration is not required to be personal, no elector who is registered and otherwise qualified to vote at an election, shall be deprived of his or her right to vote by reason of his or her removal from one election district to another election district in the same county within the thirty days next preceding the election at which he or she seeks to vote, and every such elector shall be entitled to vote at such election in the election district from which he or she has so removed. If a naturalized citizen, such person must, in addition to the foregoing provisions, have been naturalized at least ninety days prior to the day of election. In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A "new voter," within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.

FOUR

Evidence of the arrest of the Government witnesses Rinaldo and Palmieri on October 21, 1960, and their later disclosures were all fruit of the poisoned tree and should have been suppressed as having been obtained by and through wire tapping.

During the course of the trial, it was discovered that an order had been issued pursuant to New York State law providing for the interceptions of telephone communications on the home telephone of the principal Government witness, Salvatore Rinaldo. It was established at hearings held subsequent to the return of the jury's verdict that an actual wire tap had been employed. That tap was installed and functioned during the period commencing September 23, 1960, and ending October 20, 1960 (S.M. H6708). This telephone surveillance was conducted by Deputy Sheriff Arthur L. Thela of the Westchester County Sheriff's office. At or about the middle of October, 1960, Deputy Sheriff Thela also placed a tap upon the phone of one Dominick's Art Gallery in Yonkers, New York, a premises occupied by the principal Government witness Rinaldo's brother-in-law, and used by Rinaldo (S.M. H6709). The telephone surveillance was part of a general investigation of Salvatore Rinaldo, which had commenced on or about May of 1960, and continued up until the date of his arrest, October 21, 1960 (S.M. H6709). Shortly after the commencement of this general investigation, the Westchester County Sheriff's Office began working "hand in glove" with the agents of the Federal Bureau of Narcotics (S.M. H6701-2, H6722).

Sheriff Hoy testified that he conveyed information prior to October 21, 1960, to Federal Bureau of Narcotics Agents

Selvaggi and Ward about Rinaldo, and about the other principal Government witness, Matteo Palmieri (S.M. H6603-4) Sheriff Hoy also indicated that prior to October 21, 1960, as a result of a conversation that he had with Deputy Sheriff Arthur Thela, he knew that Palmieri and Rinaldo were going to Pier 84 in New York City and pick up a trunk. He had that information on October 18, 1960, three days before the arrest of the two principal Government witnesses on their return from the said Pier 84 with a trunk containing 10 kilograms of heroin (S.M. H6624-5). From this arrest, the Government developed the case which resulted in the convictions from which the present appeal is taken. Salvatore Rinaldo testified during the trial as follows:

"By Mr. Krieger:

Q. You have no recollection of his calling you at your home? A. I would not doubt that he called me.

Q. Do you have a recollection of his calling you, Mr. Palmieri, the baker, calling you during the month of October, 1960? A. I believe he did.

Q. When he called you, do you recall his asking you to meet him down at the Pier? A. Yes, I do.

Q. Was the appointment made for October 21, 1960? A. Yes, it was.

Q. And that was the time that you were arrested? A. That is correct."

Rinaldo's above testimony, given approximately two months prior to that rendered by Sheriff Hoy, is corroborated unquestionably by Sheriff Hoy's reference to his prior knowledge of the importation to take place on October 21, 1960. This is eminently rational, logical and consistent with the investigation then being conducted by both the Sheriff's office and the Bureau of Narcotics. It is most

inconsistent with the patently incredible claims put forth by the Sheriff's office and by the Bureau of Narcotics that just coincidentally Sheriff Hoy happened to ask for the aid and assistance of the Bureau of Narcotics the day before the arrest took place (S.M. H6703). A logical analysis of the sequence of events shows that in the course of a careful surveillance and investigation of the suspected narcotics violator, Rinaldo, both Federal Narcotics Agents and the Westchester County Sheriff's office worked together. By employment of wire taps, it was discovered that the two co-conspirators, Rinaldo and Palmieri, arranged to meet at Pier 84 in New York City on October 21, 1960. On October 20, 1960, after learning of this appointment, Sheriff Hoy executed an affidavit in support of his request for a search warrant stating that he had information that there would be narcotics in the possession of Salvatore Rinaldo at his home (S.M. H6659-60). On October 21, 1960, at approximately 7:00 a.m., Agents of the Federal Bureau of Narcotics as well as members of the Sheriff's office of Westchester County were stationed outside of the home of Salvatore Rinaldo. Other agents were engaged in mobile surveillance of Salvatore Rinaldo which required their going to Pier 84, where they witnessed the picking up of the trunk that contained the contraband. They followed Rinaldo and Palmieri to Westchester and effected the arrest. It was at this time that the execution of the search warrant was ordered and Rinaldo's home was searched. Unquestionably, this was a carefully planned, meticulously carried out police maneuver.

Such deliberate action and precise execution could not in any way have been predicated upon guesswork. The information obtained by the Sheriff's office had been made

available to the Bureau of Narcotics, and was utilized in affecting the arrest.

By the simple device of the eradication of the transcriptions of these telephone interceptions, the logical responsibility for the acts of the Sheriff's office should not be avoided.

Narcotics Agents St. Pierre and Selvaggi unquestionably worked in close cooperation with Deputy Sheriff Thela. They conducted surveillances together, including the allegedly important surveillance of the defendant Porcelli and the co-conspirator Rinaldo, which took place on October 18, 1960. This surveillance, which was introduced as corroborative testimony of the dealings of Porcelli with Rinaldo, came about only through the media of wire tap. (S.M. H6808-9).

"*By Mr. Krieger*:

Q. You knew that Rinaldo was going to the art gallery on October 18th, did you not? A. Yes, I knew he was going there.

Q. And there had been conversations concerning the art gallery prior to October 18th on Rinaldo's home telephone? A. That is correct.

Q. And you went over to the art gallery, partially as a result of the overhead conversations, to observe Rinaldo, correct? A. I don't understand the way you are putting the question sir.

Q. Was the fact that you had overheard on Rinaldo's home telephone that he was frequenting the art gallery a consideration in your going to the art gallery on October 18, 1960, to surveil Rinaldo? A. No, sir.

Q. It had no bearing on it? A. No, sir.

Q. It is not a fact that you discovered the location of the art gallery through the wire tap? A. Yes, sir.

Q. And did you advise the agents of the fact that Rinaldo was frequenting the art gallery? A. Yes, sir.

Q. And that was a fact that you learned as a result of wire tapping? A. Partially so.

Q. When you divulged to agents? A. No, sir.

Q. You just said you did, sir. Do you wish to change your testimony? A. I don't wish to change any testimony, sir."

Wire tap interception had begun with the placing of a tap upon the home phone of Rinaldo and was followed approximately two weeks later with the placing of a tap upon the phone of the brother-in-law of Rinaldo at the art gallery, which was the scene of the surveillance of Rinaldo and Porcelli.

It is respectfully submitted that under *United States* v. *Coplon*, 185 F. 2d 629 (2nd Cir. 1950), the petitioner has more than met his burden of showing that this prosecution is at least the fruit of the poisoned tree. The burden had shifted to the Government to show that this prosecution arose from sources other than those tainted by wire tapping. The Government at no time during the hearing showed the genesis of this case other than by uttering conclusory statements to the effect that an interrogation of Rinaldo gave them the evidentiary material which fathered this prosecution. In proceedings of this type, the Court is entitled to facts rather than conclusions.

The petitioner Schiffman maintains that he had standing to bring a motion to suppress within the purview of *United States* v. *Goldstein*, 316 U. S. 114 (1942), as Rinaldo testi-

fied to telephone conversations between himself and the appellant. The conversations were at least part of the evidence adduced pertaining to Count 28 of the indictment (S.M. 2197-8).

It is respectfully submitted that this matter should be remanded for a hearing in the lower court to determine that none of the information relied upon by the Government in the prosecution of this case, was obtained from a tainted source.

FIVE

The petitioner *Charles Schiffman* specifically adopts and incorporates all the points raised by co-petitioner *Charles Tandler* in his petition for a writ of Certiorari filed simultaneously herewith and arising from the judgment in the United States Court of Appeals (second Circuit) entitled *United States of America* v. *Vito Agueci, et al.*, decided November 8, 1962.

SIX

The petitioner Charles Schiffman specifically adopts and incorporates the Points of co-petitioner, Matthew Palmieri in his petition for a writ of Certiorari filed simultaneously herewith and arising from judgment in the United States Court of Appeals (Second Circuit) entitled *United States of America* v. *Vito Agueci, et al.*, decided November 8, 1962 wherein, "the Trial Court committed reversible error when it failed to properly instruct the jury on the conspiracy count as to the necessary element of knowledge of illegal

importation" and wherein, "the co-petitioner was deprived of a fair trial by the jury's exposure to the prejudicial publicity."

The petitioner Schiffman respectfully suggests to the Court that it would be unnecessarily repetitious to set forth at length the same arguments and authorities cited in the above points.

SEVEN

The appellant Schiffman adopts and incoporates into this brief all of the points raised by all other petitioners in their petitions for Writs of Certiorari filed simultaneously herewith and arising from judgment in the United States Court of Appeals (Second Circuit) entitled *United States of America* v. *Vito Agueci, et al.*, decided November 8, 1962.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER,
Attorney for Petitioner,
Charles Schiffman.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—October Term, 1962

(Argued October 4, 1962 Decided November 8, 1962)

Docket No. 27466

UNITED STATES OF AMERICA,

Appellee,

v.

VITO AGUECI, FILIPPO COTTONE, ROBERT GUIPPONE, LUIGI LO BUE, MATTHEW PALMIERI, ANTHONY PORCELLI, CHARLES SHIFFMAN, ROCCO SCOPELLITTI, CHARLES TANDLER and JOSEPH VALACHI,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and KAUFMAN, *Circuit Judges*.

Appeals from judgments of conviction for violation of, and conspiracy to violate, the federal narcotics laws, 21 U.S.C. §§ 173, 174, after a trial by jury before Herlands, J.

Appendix A

in the United States District Court for the Southern District of New York.

Affirmed.

JULIAN C. TEPPER, New York, N. Y. *for Vito Agueci, appellant.*

JEROME LEWIS, New York, N. Y. (Theodore Krieger, New York, N. Y., on the brief), for *Filippo Cottone, appellant.*

LAWRENCE A. KOBRIN, New York, N. Y., *for Rocco Scopellitti, appellant.*

MENAHEM STIM, New York, N. Y., *for Joseph Valachi, appellant.*

FRANCES KAHN, New York, N. Y., for *Luigi Lo Bue, appellant.*

ALBERT J. KRIEGER, New York, N. Y., *for Charles Shiffman and Charles Tandler, appellants.*

THEODORE KRIEGER, JR., New York, N. Y., *for Robert Guippone, Anthony Porcelli and Matthew Palmieri, appellants.*

T. F. GILROY DALY, Assistant United States Attorney, Southern District of New York, New York, N. Y. (Vincent L. Broderick, United States Attorney, Sheldon H. Elsen, Arnold N. Enker, Michael F. Armstrong, Peter K. Leisure, Assistant United States Attorneys, on the brief), *for appellee.*

Appendix A

KAUFMAN, *Circuit Judge*:

The ten defendants before us appeal their convictions for violation of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The defendants were sentenced to imprisonment for periods ranging from five years to twenty-five years,[1] after a two-month trial before a jury in the Southern District of New York. The indictment, filed on May 22, 1961, contained thirty counts. The first count charged all of the appellants and several others with conspiracy to violate the narcotics laws, commencing in September 1958 and continuing until May 1961; counts two through thirty separately charged various defendants with substantive violations. Several individuals were named in the indictment as coconspirators but not as defendants[2] and other coconspirators named as defendants were not tried below for various reasons.[3] Michael Maiello was also convicted but died while his appeal was pending.

At the trial, the Government's case depended principally upon the testimony of two witnesses, Salvatore Rinaldo and Matteo Palmeri, who had not been named as defend-

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[1] Filippo Cottone received a five-year sentence; Rocco Scopellitti, ten years; Vito Agueci, Luigi Lo Bue, Anthony Porcelli, and Charles Tandler, fifteen years; Robert Guippone, Matthew Palmieri, and Joseph Valachi, twenty years; Charles Shiffman, sentenced as a multiple narcotic offender, received a twenty-five year sentence.

[2] Charles Di Palermo, George Guido, Mario Mazzaro, Vito Mazzaro, Joseph Ragone, Rocco Sancinella, Salvatore Valente, and Ralph Wagner.

[3] William Holmes died before the trial and Albert Agueci, who was a fugitive, died during the trial. Vincent Mauro, Frank Caruso, Salvatore Maneri and Morris Taubman fled the jurisdiction. John Papalia had not, at the time of trial, been extradited from Canada. Arnold Barbeto was found incompetent to stand trial.

ants in the indictment but had been charged with participation in the conspiracy. Their testimony was offered to establish that the appellants and numerous other persons had engaged in a single conspiracy to import from Italy large quantities of heroin, which they adulterated, packaged, distributed, and sold in the United States. The conspiracy, defined generally involved the importation of narcotics into this country by concealed packages hidden in valises or false-bottom trunks, most of which were unwittingly brought to New York piers by Italian immigrants. These immigrants were requested to bring the trunks and valises to this country by a travel agent in Italy, purportedly as a favor to some friends here. Whenever this method proved for some reason unsatisfactory, one of the appellants would travel abroad in order personally to assure the success of the venture. For convenience, we may refer to the small body of coconspirators who initiated the various importations and the subsequent distributions and sales of the narcotics as the "executive group." The Government's witnesses established that the members of this group were Albert Agueci,[4] Frank Caruso, Vincent Mauro, and John Papalia, none of whom are appellants, and Vito Agueci, Luigi LoBue, and Joseph Valachi, appellants here. In addition to these men, appellant Rocco Scopellitti was also implicated in the importation scheme, for he was alleged to have personally imported heroin into this country in August 1960.

Upon ascertaining the precise dates of the arrival in New York of the narcotics being imported, one of the members of the executive group would contact Matteo Palmeri,

[4] Albert Agueci, a fugitive at the time of trial, was killed during the course of the trial. His brother Vito is one of the appellants before us.

the Government witness, who ran a bakery in Brooklyn.[5] Palmeri, using his bakery truck, would drive to Pier 84 in Manhattan, seek out the immigrant who was bringing the trunk or valise containing the narcotics and identify himself as a friend of the Italian travel agent, and return with the trunk or valise to his bakery. On one occasion, when Palmeri's truck was out of order, he enlisted the aid of appellant Filippo Cottone. Palmeri was often assisted by Salvatore Rinaldo, the other chief witness for the Government. Rinaldo would perform a test on the white powder contained in the hidden packages to assure that it was heroin. The packages of narcotics were at first hidden in Palmeri's bakery, and later in Rinaldo's home in Mount Vernon.

Until October 24, 1960, when they were arrested, Palmeri and Rinaldo were the primary distributing agents for the conspiracy. They would be contacted by one of the members of the executive group and instructed to deliver a specified quantity of narcotics to a specified individual at a specified time. Thus, in the month of July 1959, Caruso told Rinaldo to meet with appellant Matthew Palmieri in order to consummate a sale. In December 1959, Valachi introduced appellant Anthony Porcelli to Rinaldo for a like purpose, and in April 1960, Porcelli introduced Rinaldo to another appellant, Ralph Guippone. The three coconspirators—Rinaldo, Porcelli and Guippone—would adulterate the heroin in Rinaldo's home, sell the product to other individuals named in the indictment but not here on appeal, and share in the proceeds of the sale. In May of

[5] Matteo Palmeri is not to be confused with Matthew Palmieri, one of the appellants.

1960, at a racetrack rendezvous, and at the instructions of Caruso, Rinaldo met with appellant Charles Shiffman who was later instrumental in arranging sales of narcotics from Rinaldo to appellant Charles Tandler.

This, in skeleton outline, is the manner in which the alleged conspiracy operated and the manner in which each of the appellants was implicated. This information will be helpful in giving form to the narrative of specific events, which follows.

The indictment charges a continuing conspiracy from September 1958 until the date of its filing, May 22, 1961. The testimony of Government witnesses Palmeri and Rinaldo establishes the sequence of events through October 21, 1960, when both were arrested. In October of 1958, Matteo Palmeri met Albert Agueci, one of the members of the executive group, in Brooklyn; in response to questioning, Palmeri indicated that he would be interested in participating in a plan to smuggle diamonds. The following month, appellant Luigi Lo Bue appeared at Palmeri's bakery in Brooklyn, and he informed Palmeri that he was aware of his interest in diamond smuggling, which information had been conveyed by Albert Agueci. In May of 1959, LoBue again contacted Palmeri, telling him to go to Pier 84 in order to pick up a valise from a named passenger and to identify himself (Palmeri) as a friend of Salvator Valenti, the Italian travel agent who was allegedly responsible for "planting" the valises with Italian immigrants. Palmeri did so and delivered the valise into LoBue's hands at the bakery. Some days later, LoBue returned to the bakery with five packages which he gave to Palmeri to be hidden. Soon after, Palmeri brought those

packages, on LoBue's instructions, to Vincent Mauro, who, along with LoBue, is alleged to have been a member of the executive group. Mauro, over the course of a few days, paid $13,000. to Palmeri, who in turn passed the money on to LoBue; Palmeri was rewarded for his efforts with $300.

In July 1959, LoBue told Palmeri that he had received a letter from Italy and that Palmeri should report to the pier and meet the passenger named in the letter, procure the valise, and return to the bakery. Palmeri did so, and upon observing LoBue remove a blanket from the valise, cut it open and withdraw packages of white powder, Palmeri was told by LoBue that they were dealing not in diamonds but in narcotics. Again, Palmeri was requested to hide the packages, and he again made another sale at Mauro's direction, receiving $15,000. That month, Palmeri was introduced to Salvatore Rinaldo, the other chief Government witness, and from that time Palmeri delivered heroin to Rinaldo, in order to facilitate the latter's sales. The first such sale was from Rinaldo to defendant Matthew Palmeri, in exchange for $8500., which money Rinaldo transmitted to Caruso. This incident occurred in July 1959. Another sale on precisely the same terms was carried out between Rinaldo and appellant Palmeri on March 21, 1960.

Rinaldo's position as central distributor became even more secure when, in December 1959, Mauro, of the executive group, told appellant Valachi, another member of that group, that narcotics were to be picked up from Rinaldo, Valachi met with Rinaldo that month, and introduced him to appellant Anthony Porcelli; Valachi said that Porcelli

was working for him and that it would be Porcelli who would pick up narcotics from Rinaldo in the future. The next morning, with Valachi standing nearby, Rinaldo delivered a package of heroin to Porcelli, which was paid for over the course of two or three weeks. Rinaldo turned over the proceeds of the sale to Caruso. In January of 1960, Rinaldo was introduced to two additional contacts[6] to whom further sales were made.

In late January, LoBue notified Palmieri, the baker, that a third shipment of narcotics was arriving in a valise carried by a named Italian immigrant on March 7, 1960. Palmeri performed his usual function, retrieved the valise with the hidden packages of narcotics, and passed these on to Rinaldo, who tested a sample of the substance from each of the packages. He found it to be heroin. Soon thereafter, on March 19, Rinaldo met with appellant Valachi, who informed him that "he was going away", and that in his absence, Rinaldo should deal with appellant Porcelli and with one Michael Maiello. Valachi said that although he was going away, Porcelli and Maiello would be taking care of him and sharing with him any profits these two would make on the sale of narcotics. It turned out that Valachi was indeed "going away" soon, for nine days later he surrendered to federal authorities on another charge and was incarcerated in prison.

Losing little time, Porcelli went to Rinaldo's home in Mount Vernon, in April 1960, and introduced appellant Robert Guippone; he said that Guippone was one of the men who was carrying on in Valachi's interest while Val-

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[6] Ralph Wagner, named in the indictment but not a defendant below, and William Holmes, named as a co-defendant below who died before trial.

achi was imprisoned. Plans were made to dilute quantities of heroin with milk sugar, to sell them, and share the profits. The dilution and sales were made on several occasions in the months of May, June, August, and September 1960, and Rinaldo, Porcelli, and Guippone shared in the handsome profits, with some of the money going, on at least one occasion, to Caruso. These transactions represent the eleven substantive counts on which both Porcelli and Guippone were convicted.

At approximately the same time that Guippone and Porcelli first met with Rinaldo in April 1960, a meeting of several members of the executive group took place at a Manhattan restaurant. They there decided that future narcotic importations would be in trunks with false bottoms rather than in valises. That month, appellant Vito Agueci went to Italy, for what he claimed was a visit to his aged parents. The Government, of course, places a different interpretation on the facts and points out that this was not the only purpose to be reasonably inferred from this trip, for proof was introduced that in May of that year, Vito Agueci wrote a letter from Italy to Palmeri, telling him that a trunk and a valise would be brought into this country on June 2, 1960, and that Palmeri should be there to pick them up. Rinaldo accompanied Palmeri to the pier at that time; he later tested the packages secreted in the trunk and valise and found them to contain heroin, weighing fifteen kilograms.

Notification of the next shipment came quickly upon the heels of the June 2 importation. In July, Palmeri received a letter from Salvatore Valenti, the Italian "travel agent", informing him that appellant Rocco Scopellitti was to ar-

rive from Italy on August 10. On that morning, Palmeri was contacted by Albert Agueci, appellant's brother and member of the executive group, who told him that Scopellitti worked for him and was to be fully trusted. At the pier, Scopellitti and Palmeri loaded the trunk into Palmeri's truck and drove back to the bakery. En route, Palmeri asked Scopellitti when he was returning to Italy and Scopellitti replied that he would go whenever Albert Agueci wanted him to pick up another trunk. When they reached the bakery, they were greeted by Rinaldo, who had earlier been instructed by two members of the executive group that he was no longer to accompany Palmeri to Pier 84 but was to wait for him at the bakery. Palmeri introduced Scopellitti, telling Rinaldo that Scopellitti was "all right", and that he had made the trip from Italy with the trunk; Scopellitti, to dispel any further doubt, said "Don't worry. I know what it's all about." The three proceeded to rip open the false bottom of the trunk which revealed packages of heroin.[7] Rinaldo took the packages to his home; he tested them and found them to contain heroin.

While these two shipments of June and August 1960 were being planned and consummated, Rinaldo was making further sales at the behest of the executive group. In late May, Caruso told him to meet with appellant Charles Shiffman at the Roosevelt Raceway, which Rinaldo did. A night or two later, Rinaldo was introduced to appellant Charles Tandler. It was there agreed that Shiffman would

[7] Scopellitti contends, however, that the Government's proof indicates that he was requested to leave before the packages of narcotics were removed from the bottom of the trunk, and that there was thus no proof that he was aware of the substance allegedly smuggled into the country.

transmit certain code phone calls from Shiffman to Rinaldo, whereupon Rinaldo would meet with Tandler at an appointed rendezvous for the purpose of selling him narcotics. Pursuant to this plan, Rinaldo delivered three kilograms of heroin to Tandler shortly after this meeting at the race-track. Three kilograms were again delivered to Tandler on August 13 and four more in early October. On October 10, Shiffman and an associate paid Rinaldo $25,200 for the last sale to Tandler, and Rinaldo turned the money over to Caruso.

The fifth shipment of narcotics was again preceded by a letter from Italy, informing Palmeri that a trunk would arrive on September 2. Palmeri drove to Pier 84 but was unable to claim the trunk because he could not find the immigrant who had shepherded it from Italy. After some frantic phone calls and some impatient days of waiting, it was finally learned that the claim check and the keys to the trunk could be found at a given address in Garfield, New Jersey. Palmeri procured the check and the keys and was prepared to set out for the pier when he found that his truck was not in working order. Albert Agueci previously had informed Palmeri that in case of such difficulties he should contact Filippo Cottone, one of the appellants. Palmeri did so and told Cottone that he needed his help to get down to the pier to pick up a trunk containing narcotics; he promised Cottone $300 for his services. En route from the pier back to the bakery, Cottone was critical of Palmeri and his associates for the mishandling of the pick-up of the trunk. "I can't understand * * * how you people do things, it is ridiculous"; he added that there had been

no trouble with the other shipments. At the bakery, where Rinaldo was again waiting, Cottone was introduced by Palmeri, who endorsed him as being "all right". The three ripped open the trunk's false bottom, which contained ten packages of heroin. Cottone took away one of the blankets in which three kilograms of heroin were concealed but which Palmeri had overlooked; these were soon retrieved by Palmeri. Rinaldo again tested samples and found heroin.

Vito Agueci, during the month of September 1960, took a second trip to Italy. From there, he notified Palmeri that another shipment was due October 21st, and Palmeri in turn notified Rinaldo. Rinaldo relayed the message to Porcelli in a conversation with him in Mount Vernon. Shortly before the narcotics were to arrive, Caruso of the executive group informed Rinaldo that the woman who ran Palmeri's bakery was growing suspicious; all future imported trunks were therefore to be taken directly from the pier to Rinaldo's house. Palmeri was informed of the new routine, and on October 21 both he and Rinaldo went to Pier 84 and picked up what was to be the last shipment of narcotics. It was en route to Rinaldo's home in Mount Vernon that both men were arrested by Westchester County police and federal narcotics agents. The trunk they were transporting was found to contain ten kilograms of what was determined by United States Government chemists to be heroin.

Appendix A

I.

We shall first consider those contentions raised by the appellants which affect all or several of them; we shall then proceed to discuss those contentions specifically raised on behalf of particular defendants.

THE CONSPIRACY INSTRUCTION

The appellants challenge the propriety of the trial court's instructions regarding the scienter necessary to a finding of conspiracy to violate the federal narcotics law, specifically, 21 U. S. C. § 174. Even assuming that defendants may be heard to complain despite their failure to call the alleged error to the judge's attention, see *Screws* v. *United States*, 325 U. S. 91, 107 (1945); *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936); *United States* v. *Massiah*, 307 F. 2d 62 (2d Cir. 1962), we hold that Judge Herlands adequately covered in his charge all the elements necessary to warrant a finding of guilt for participation in a narcotics conspiracy. He charged as follows:

> "Count 1 of the indictment charges that each of the defendants on trial conspired to violate the Federal Narcotic Laws. In order to convict under the first count of the indictment, you would have to find:
>
> First: that sometime between September 1, 1958 and May 22, 1961, in the Southern District of New York, a conspiracy to violate the narcotic laws existed between any one of the defendants on trial and any other defendant, either on trial or not on trial, or any co-conspirator named in the indictment.

Second: you would have to find that it was part of this conspiracy to do any one of the following:

a. Unlawfully import and bring large amounts of narcotic drugs into the United States from Italy; or

b. To receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of narcotic drugs after they had been imported and brought into the United States, knowing that the said narcotic drugs had been brought into the United States illegally; or

c. To dilute, mix and adulterate large quantities of the *said* narcotic drugs prior to distribution.

Third: In addition to your finding that there was a conspiracy, and that it was part of the conspiracy to do one of these three things just enumerated, you would have to find that at least one of the 14 overt acts charged in the indictment was actually committed • • •.

The fourth and final element you would have to find as to each of the defendants is that he knowingly became a member of the conspiracy." (Emphasis added.)

This instruction made it plain beyond challenge that the crime charged was a conspiracy to violate the narcotics law and that requisite to a finding of such violation is knowing participation in a scheme having as an objective the importation of narcotics contrary to law, or the knowing transportation or facilitation of sales of narcotics after they have been knowingly brought into the country illegally, or the knowing adulteration of those very narcotics. It is thus clear that *United States* v. *Massiah*, 307 F. 2d 62

(1962), recently decided by this Court (Chief Judge Lumbard dissenting)—even assuming its correctness—is not in point. The fatal error in the judge's instruction in *Massiah* was his failure "*at any point* in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy" to violate the narcotic laws. 307 F. 2d 70 (Italics in the original). There the trial judge devoted his instructions to those elements common to all criminal conspiracies rather than focussing on the narcotics aspect of the conspiracy; the latter would have required that the jury find the defendants to have had knowledge that the narcotics had been or were to be unlawfully imported.

Not only did the trial judge in *Massiah* fail affirmatively to instruct the jury on the element of knowledge, but it was determined on appeal that certain passages in the court's discussion of the general law of conspiracy actually "suggested to the jury that knowledge of importation was not necessary * * *" (307 F. 2d at 70). The majority of the Court cited this passage from the charge: "One may become a member of a conspiracy without full knowledge of all the details of the conspiracy or of all the conspirators." Appellants point to a similar passage in Judge Herlands' charge, but even in that passage, there is an important difference in emphasis. He stated: "It is not necessary that one be fully informed as to the details of the scope of the conspiracy *in order to justify an inference of knowledge on his part.*" (Emphasis added.) This instruction pointedly emphasized the need to find that the defendants charged with conspiracy had *knowledge* of the general illicit purposes of importation, transportation, or

adulteration; it cautioned the jury that omniscience regarding every aspect of the conspiracy was not indispensable to a finding of such knowledge but that legitimate and reasonable inferences of such knowledge could be drawn. This is an unchallenged maxim of criminal law. We recently held in *United States* v. *Aviles*, 274 F.2d 179, 188 (2d Cir.), cert. denied, 362 U. S. 974 (1960), that individuals who purchased narcotics from one of the conspirators were themselves participants in the conspiracy if "it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial." See *United States* v. *Rich*, 262 F. 2d 415, 418 (2d Cir. 1959).

Upon a reading of the whole charge, see *Carey* v. *United States*, 296 F. 2d 422, 426 (D. C. Cir. 1961), *Gilmore* v. *United States*, 256 F. 2d 565 (5th Cir. 1958), we are convinced that the jury had constantly before it the judge's admonition that the elements set down in 21 U. S. C. § 174, among them knowledge of the illegal importation, were indispensable to a finding of guilt on the conspiracy count.

EVIDENCE OF A SINGLE OVERALL CONSPIRACY

Several appellants contend that, although the indictment charged a single continuing conspiracy from late in 1958 until the time of the filing of the indictment, there was proof of several separate and independent conspiracies. The variance in proof is deemed by these appellants to be of such a serious and prejudicial nature that reversal is required. See *Kotteakos* v. *United States*, 328 U. S. 750 (1946); *United States* v. *Russano*, 257 F. 2d 172 (2d Cir.

1958). We find that there was ample proof to warrant the finding of a single continuing conspiracy.

The Government's evidence successfully assimilates the conspiracy before us to the model of the so-called "chain" conspiracy, so familiar in other narcotic cases. See *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir.), cert. denied, 362 U. S. 974 (1960); *United States* v. *Stromberg*, 268 F. 2d 2586 (2d Cir.), cert. denied, 361 U. S. 863 (1959); *United States* v. *Rich*, 262 F. 2d 415 (2d Cir. 1959). The "chain" conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser. See Note, "Federal Treatment of Multiple Conspiracies," 57 Colum. L. Rev. 387, 390 (1957). That form of conspiracy is dictated by a division of labor at the various functional levels—exportation of the drug from Europe and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user. Here, the members of the executive group—among them, appellants Vito Agueci, Luigi LoBue, and Joseph Valachi—formed the core of conspirators. They arranged for the exportation of large quantities of narcotics from Italy, for their importation into this country, and for their safe delivery from the New York piers for ultimate distribution by Palmeri into the hands of Rinaldo who would arrange for sales in successive transactions. Scopellitti and Cottone were participants, each on one occasion, in this process. Rinaldo was shown to be the central distributor, the key "link" in the "chain", and from him the distribution and sale links—composed of Porcelli, Guippone, Palmieri,

Shiffman, and Tandler—carried the narcotics to the ultimate purchaser.

Guippone and Porcelli contend that the evidence against them reveals, at best, a separate enterprise between them and Rinaldo, devoted to the adulteration and sale of narcotics quite independent of the conduct of the other members of the conspiracy. The answer to this is that the mere fact that certain members of the conspiracy deal recurrently with only one or two others does not exclude a finding that they were bound together in one conspiracy. Here, there was ample proof that both Porcelli and Guippone were left to carry on the interests of appellant Valachi while the latter was in prison. Valachi had indeed introduced appellant Porcelli to Rinaldo and stood nearby when a sale was consummated between the two. Both Porcelli and Guippone had to be aware, by the nature of the enterprise, that Rinaldo was constantly being supplied with new quantities of narcotics; their repeated adulterations of the narcotics over a period of several months, their expressed intention to carry on the interests of Valachi, one of the members of the executive group, their splitting of the profits of their sales on at least one occasion with Caruso, another member of the executive group, readily support that conclusion. Knowing of these outside sources, it was enough to make Porcelli and Guippone members of the overall conspiracy that the success of their "independent" venture was wholly dependent upon the success of the entire "chain". *United States* v. *Bruno*, 105 F. 2d 921 (2d Cir.), rev'd on other grounds, 308 U. S. 287 (1939); see *United States* v. *Aviles*, 274 F. 2d at 188. An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that

for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the Government in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level. See *United States* v. *Stromberg, supra*.

The nature of the enterprise determines whether the inference of knowledge of the existence of others in one overall conspiracy is justified. It is clear that in a narcotic conspiracy case of this nature no one member of the group can by himself insure the success of the venture; he must know that combined efforts are required. See *United States* v. *Bruno, supra*, at 922. "[T]he conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers." In *Bruno*, narcotics were smuggled into New York and ultimately sold in Texas and Louisiana as well as in New York. Four groups were involved—the smugglers, the middlemen, and two groups of retailers. The importers could not profitably stay in business without a selling outlet and the reverse was true, for the retailers required a continuing source of supply. Comparison of the facts in *Bruno* with those in the oft-cited case of *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938), relied on by appellants, shows the inappositeness of the latter. In *Bruno* the evidence sufficed to warrant the jury's finding that defendants

knew remote links must have existed; in *Peoni* it did not. Had the prosecution in *Peoni* been able to establish more than one sale from Peoni to Regno, the inference that Peoni knew that sales beyond his own would be made, and that he thus shared a common purpose with Dorsey as Regno's vendee, might well have been strong enough to warrant submission to the jury. *Kotteakos* v. *United States*, 328 U. S. 750 (1946), where the success of any individual illegal transaction was independent of the success of any other, is sufficiently distinguishable. *Kotteakos* is usually given as the prime example of the so-called "circle" or "wheel" conspiracy, which is not what we are dealing with here. See Note, 57 Colum. L. Rev. 387, 388-89 (1957).

In any event, the test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). The material inquiry is not the existence but the prejudicial effect of the variance. While we believe, as we have already stated, that the jury could find there was but one conspiracy, the finding of more than one conspiracy would not result in prejudice to any of the defendants in the case before us. See *Berger* v. *United States*, 295 U. S. 78, 82 (1935). The requirements for sustaining a verdict in which there has been a variance have been met. The several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal. See *Blumenthal* v. *United States*, 332 U. S. 539, 559-60 (1947); *Hanis* v. *United*

States, 246 F. 2d 781, 789 (8th Cir. 1957); *Ritter* v. *United States*, 230 F. 2d 324, 328-29 (10th Cir. 1956); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 635 (2d Cir.), cert. denied, 329 U. S. 742 (1946); Note, "Developments in the Law of Criminal Conspiracy," 72 Harv. L. Rev. 920, 992 (1959). Again *Kotteakos*, where the prosecution of thirty-two defendants resulted in proof of at least eight separate conspiracies, is inapplicable.

Appellant Palmieri contends that there was insufficient evidence to support his conviction on the conspiracy count. Since we find that his conviction on substantive count 5 of the indictment, for a sale of narcotics on March 21, 1960, was sufficiently supported by the evidence, any discussion of his conspiracy conviction is rendered moot; Judge Herlands imposed concurrent sentences on each count. See *Sinclair* v. *United States*, 279 U. S. 263, 299 (1929); *United States* v. *Mont*, 306 F. 2d 412, 414 (2d Cir. 1962).

EVIDENCE OF NARCOTICS IN THE SUBSTANTIVE COUNTS

It is not necessary, in order for the Government to prove its case of conspiracy to violate the narcotic laws, that there be proof of actual dealings in narcotics. All that need be proved is the unlawful agreement and an overt act committed in pursuance of the agreement. The "conspiracy is a crime in and of itself, separate and apart from the crime of importation, purchase, sale, and transportation of narcotics." *Poliafico* v. *United States*, 237 F. 2d 97, 105 (6th Cir. 1956), cert. denied, 352 U. S. 1025 (1957). Cf. *Braverman* v. *United States*, 317 U. S. 49, 54 (1942); *Pereira* v. *United States*, 347 U. S. 1, 11 (1954). The rule

is otherwise, however, with regard to substantive violations of the narcotics laws; there, the jury must be convinced beyond a reasonable doubt that the substance imported, sold, concealed, or adulterated was in fact a narcotic drug. This element, under the terms of 21 U. S. C. § 174, is requisite to a conviction. But it is not necessary that it be proved by direct evidence. Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished ground for inferring that the material in question was narcotics. See *United States* v. *Morello*, 250 F. 2d 631, 633-34 (2d Cir. 1957).

The appellants who have been convicted on substantive counts do not challenge these principles of law. They contend, instead, that the trial judge did not adequately compartmentalize the circumstantial evidence as it was relevant to the proof of narcotics in a particular substantive count charged against a particular defendant. It is contended that the jury was, in essence, instructed that in determining the guilt of one defendant under a substantive count of the indictment, they should weigh evidence relating to other substantive counts, to other defendants, and to transactions in which the particular defendant was not even involved. The judge's instruction is therefore contended to violate the principle laid down in *United States* v. *Bufalino*, 285 F. 2d 408 (2d Cir. 1960), that proof in a mass conspiracy trial must be individualized and compartmentalized, defendant by defendant and count by count.

Appendix A

Evidence admissible to prove only the conspiracy was, it is argued, improperly employed to prove the individual substantive counts.

We hold that Judge Herlands' instructions on the use of circumstantial evidence to determine that the material in question was narcotics in the various substantive counts were adequate. He charged that there were seven categories of circumstantial evidence which the jury might consider in determining whether a given defendant had possession of or had imported the narcotic drug as charged in each substantive count: (1) Rinaldo's testimony that he had personally tested samples of the powder from each shipment; (2) the secrecy and deviousness with which the transactions were handled (*i.e.*, false-bottomed trunks, use of linings in the blankets, code words, etc.); (3) the fact that the substance in which they were dealing was a white powder; (4) the high prices paid in cash for the substance; (5) the lack of complaint on the part of the purchasers; (6) descriptive language used by certain of the defendants in connection with certain transactions; (7) the white powder in evidence which the United States chemist testified was heroin hydrochloride. A conviction on similar evidence was upheld in *Toliver* v. *United States*, 224 F 2d 742, 745 (9th Cir. 1955).

In a trial of this dimension, each juror is faced with a difficult task in compartmentalizing the evidence with regard to each particular defendant and keeping clearly in mind the full circumstances of each transaction. It is the function of the judge, in his instructions to the jurors, to marshal the evidence that they have seen and heard pre-

sented such that justice may be meted out to the individual rather than to the group. Our concept of criminal responsibility, like our concept of moral responsibility, is rooted in the individual, his intentions, his motives, and his conduct. The trial judge, therefore, has the burden of impressing upon the jury the need for judging each defendant separately upon each separate substantive count charged in the indictment. We feel that Judge Herlands patiently and capably performed this task. His instructions to the jury were replete with admonitions that "you must be convinced beyond a reasonable doubt that the substance involved in each of such substantive counts was a narcotic drug * * *."

That portion of the charge on circumstantial evidence of narcotics most likely to result in harmful side effects to the defendants was the following: "6. The Government claims that its witnesses, Palmeri and Rinaldo, testified as to admissions by *certain* of the defendants that they were dealing with narcotics in connection with *certain* transactions." (Emphasis added.) Even there, the emphasis upon particular defendants in particular transactions is strong. We feel that any possible ambiguity was cured by the passage almost immediately following: "If the evidence convinces you beyond a reasonable doubt that the substance involved in a particular count—and you must consider the evidence count by count—was heroin, you may conclude that this element of the offense charged in particular count has been proved. If, on the other hand, the evidence does not convince you beyond a reasonable doubt that the substance involved in a particular count was heroin, you must find the defendant or defendants named in the particular count

not guilty on that particular count."[8] Reading the charge in its entirety and observing the emphasis which the trial judge placed on the necessary requirements of proof, we cannot agree that the jury was not instructed on the need to compartmentalize the evidence and on the consideration it was to give to the evidence as it applied to each defendant on each substantive count.

The Government further argues that were we to construe Judge Herlands' charge as suggested by the appellants, there was no error, for anything said or done by a conspirator in furtherance of the conspiracy is admissible against every other conspirator, even on a substantive count. This principle of law, they argue, is operative despite the absence of a charge of conspiracy in the indictment. We are referred to *Pinkerton* v. *United States*, 328 U. S. 640, 645-48 (1946), and *United States* v. *Pugliese*, 153 F. 2d 497 (2d Cir. 1945). The appellants reply that the application of principles of agency to the criminal law, see 4 Wigmore, Evidence § 1079 (3d ed. 1940), has been restricted to cases of actual aiding and abetting, to cases of present specific participation in the specific acts which make up the crime charged in the substantive offense; the principles are said not to ex-

[8] Earlier in his charge the judge clearly emphasized the need to individualize and compartmentalize when he stated "It is your recollection and your recollection alone that determines whether or not the following items advanced by the Government's contentions prove, with respect to *each* substantive count concerning which the asserted items of proof respectively relate, that the substance was heroin hydrochloride." And in another portion of his charge he stated: "However, with respect to all of the substantive counts, as distinguished from the conspiracy count, you must be convinced beyond a reasonable doubt that the substance involved in *each* of such substantive counts was a narcotic drug * * *" (Emphasis added).

tend to cases of broad-ranging conspiracy. Since we have held that Judge Herlands adequately compartmentalized the evidence with regard to the substantive offenses of the individual defendants, we are not required to determine whether each item of evidence could not properly be considered against each conspirator under the rule of law advanced by the Government.

Appellant's final attack upon the proof that the material was narcotics addresses itself to the sufficiency of the evidence on this phase of the case. We reject this argument, for we find the evidence introduced to establish that the material in question in the substantive counts was narcotics to be quite convincing. All the narcotics referred to in those counts went through the hands of Rinaldo, who testified that he tested a sample from each shipment, except the last, and found narcotics each time. The last shipment, as well as samples from some earlier shipments which Rinaldo had hidden in his home, were tested by United States Government chemists and found to be narcotics. The appellants contend that Rinaldo's tests—change of color upon the addition of nitric acid and liquification upon heating the powder to between 230°C and 240°C—were insufficient to prove that the substance was narcotics. They urge that other chemical tests must be performed before the substance can definitively be determined to be narcotics. But surely there was sufficient evidence, albeit not conclusive to a mathematical certainty, to warrant a reasonable inference to that effect. The Government need not exclude every remote possibility of innocence before its case warrants submission to the jury. See *Holland* v. *United States*, 348 U. S. 121, 139-40 (1954);

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United States v. *Tutino*, 269 F. 2d 488, 490 (2d Cir. 1959). INSTRUCTIONS ON DEFENDANT'S PRIVILEGE NOT TO TESTIFY

Appellant Tandler did not take the stand during the course of the trial. Judge Herlands, in summarizing the defense theories and contentions offered on behalf of defendants Shiffman and Tandler, instructed the jury as follows:

> "Now the defendant Shiffman took the stand. The defendant Tandler did not take the stand. The fact that the defendant Tandler did not take the stand does not give rise to any presumption or inference against him or adverse to him. As you know, under the Constitution, Fifth Amendment, no defendant in a criminal case can be compelled to be a witness against himself; and that means that in a criminal case a defendant has the prerogative and privilege not to testify, and the fact that he does not testify does not in any way, directly or indirectly, permit you to draw any inference adverse to the defendant. A defendant has the right to rely on his presumption of innocence and to put the Government to its proof."

At the conclusion of Judge Herlands' instructions, Tandler's attorney excepted to the language in this passage referring to the Fifth Amendment and to the privilege against self-incrimination. It is argued by Tandler, and by appellants Lo Bue, Palmeri, and Valachi, who also chose not to testify, that a reference to the Fifth Amendment, in an era when it is said resort to that amendment creates an indisputably unfavorable inference, was prejudicial and constituted reversible error. While most likely it would have been better if the judge had not mentioned the Fifth Amend

ment, his statement, in the context of the passage quoted above and also of the supplemental charge he later gave in response to an objection by Tandler's counsel, was not reversible error.

At common law, the accused in an ordinary criminal prosecution could not be called as a witness in his own behalf, because under the rules governing litigation until the middle of the last century, he was deemed "incompetent" to testify at all. This incapacity pre-existed the drafting of the Constitution and the Bill of Rights. The accused's incapacity to testify in a federal court was removed in 1878 by what is now Title 18 U.S.C. § 3481: "In trials of all persons charged with the commission of offenses against the United States * * * the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." It is therefore usually assumed that the constitutional provisions, "though not at all necessary, when adopted, to guard the accused against being called, were intended to preserve that result of the incompetency from being abrogated by legislation." McCormick, Evidence, § 122 at 257 (1954). The outstanding authority on evidence likewise treats the constitutional privilege against self-incrimination as the modern-day foundation for the accused's privilege not to take the stand. See 8 Wigmore, Evidence, §§ 2251 at 296, 2268 at 406 (McNaughton Rev. 1961). We believe therefore that it was *factually* proper for Judge Herlands to charge as he did regarding defendant Tandler's failure to take the stand.

Appellant Tandler has made an effort to distort the judge's instruction into an "unfavorable comment", call-

ing to our attention several cases stating the rule that a conviction should be reversed if the court comments unfavorably on the failure of an accused to testify. *Quercia v. United States*, 289 U. S. 466, 471-72 (1933); *Allison v. United States*, 160 U. S. 203, 209 (1895). We find these cases completely inapposite. It is patently contrived to argue that Judge Herlands was commenting unfavorably when in the very same passage to which objection is taken he charged twice that the jurors were forbidden to draw any adverse inferences; he also explained that the defendant has a right to rely on his presumption of innocence and to put the Government to its proof. In so doing, Judge Herlands' charge could be construed as even more favorable to Tandler than it was to the other coconspirators who likewise chose to rest upon their privilege not to testify.

Finally, in response to an exception by Tandler's counsel, Judge Herlands gave this supplemental instruction to the jury: "The legal theory for this rule is immaterial so far as you are concerned but the important and vital point for you as jurors in this case to bear in mind is that a defendant has the unqualified right not to take the stand, and you may not in any manner draw any inference against the defendant because he did not take the stand." We have held before that a clear instruction of this character may cure any prejudice resulting from an unfavorable comment, if such there was. See *United States v. Stromberg*, supra, at 271; *United States v. DiCarlo*, 64 F. 2d 15 (2d Cir. 1933); *United States v. De Vasto*, 52 F. 2d 26 (2d Cir.), cert. denied, 284 U. S. 678 (1931). The court's instruction was historically correct and, we find, could not

have been prejudicial, especially in the context of this long trial. See *United States* v. *Stromberg, supra*, at 271.

ALLEGED PREJUDICIAL NEWSPAPER PUBLICITY

One month after the opening of the trial, the New York press reported the violent slaying of Albert Agueci, one of the members of the so-called executive group. The victim, brother of appellant Vito Agueci, was a fugitive from justice at the time. Several of the jurors either read of the incident, heard about it through radio or television, or heard it discussed in the jury room. The news stories stated no reason for the death of the victim, but merely indicated that another defendant had been found dead some months before the trial, and that the brother of the slain man, Vito, was on trial for violation of the narcotics laws.

Immediately upon learning of the publicity, Judge Herlands conducted an extensive *voir dire* of the jury, questioning with great care each juror who had heard of the incident. In response to the questioning, the jurors assured the court that nothing seen or heard would affect their deliberations or ability to render a fair verdict. Throughout the *voir dire* examination, Judge Herlands repeatedly made it clear that a fair and impartial trial was essential, that it would be necessary to excuse the jurors if their judgment were prejudiced or unduly influenced by the publicity, and that the case was to be decided only on the basis of evidence presented in the courtroom. This last admonition was repeated in the closing instructions to the jury.

We hold that the nature of the publicity was such that, when conjoined with the trial judge's cautionary instructions, no prejudice resulted to defendant Vito Agueci or to his codefendants.

"The crux of the matter is whether the statements were so prejudicial as to require the trial judge, who has large discretion in such matters, * * * to empanel a new jury." *United States* v. *Feldman*, 229 F. 2d 914, 917 (2d Cir. 1962). In those cases in which newspaper publicity was deemed so prejudicial as to warrant reversal and an order for a new trial, the reports contained information regarding such obviously inflammatory and inadmissible matter as the prior criminal record of the defendant, see, e.g., *Marshall* v. *United States*, 360 U. S. 310 (1959), or clearly incriminatory out-of-court conduct; see, e.g., *United States* v. *Leviton*, 193 F. 2d 848 (2d Cir. 1951), cert. denied, 343 U. S. 946 (1952). Another matter of no small consequence which influenced the disposition of the cases cited to us on behalf of the appellants was the instrumental role of the Government in bringing the adverse publicity to light. See *United States* v. *Leviton*, *supra*; *Delaney* v. *United States*, 199 F. 2d 107, 112-14 (1st Cir. 1952). Certainly these categories are not all-inclusive, but the fact that the information disclosed by the publicity here was not centered upon any particular one of the appellants, did not refer to prior illicit conduct, and did not emanate from the Government but was a matter of general public knowledge, convinces us that the appellants' right to a fair and impartial trial was not impaired.

The typical jury, in this age of mass-communications, is not hermetically sealed from the events occurring all about

them. Of course, an effort must be made by the trial judge to caution jurors against considering extra-judicial statements pertinent to the guilt or innocence of the individuals upon whom they sit in judgment. Where the cautionary instructions are adequate, as they were here, and where the news reporting was merely routine and hardly inflammatory, the trial judge does not abuse his discretion by refusing to declare a mistrial. See *United States* v. *Stromberg*, *supra*, at 269-70; *United States* v. *Postma*, 242 F. 2d 488, 495 (2d Cir.), cert. denied, 354 U. S. 922 (1957); *United State* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 935 (2d Cir), cert. denied, 353 U. S. 984 (1957). "Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." *United States* v. *Leviton*, 193 F. 2d at 857.

These same considerations govern our disposition of the appellants' contention that prejudice was caused by a news story relating the fact that Judge Herlands, during the course of the trial, revoked the bail of the defendants and remanded them to jail. Of the three jurors who heard of this publicity, one had merely been told that there was an article about the trial judge in the newspaper, one had seen the headline but put the article aside as soon as he realized that it related to the case on trial, and one was an alternate juror who did not participate in the jury's deliberations. There is obviously no merit to this contention.

Appendix A

Other Points Raised in Behalf of All Defendants

Further issues are raised which pertain to several or all of the defendants. These can be disposed of within briefer compass.

The great preponderance of testimony offered on behalf of the Government was that of Matteo Palmeri and Salvatore Rinaldo, two of the former members of the conspiracy. Their testimony was corroborated in certain respects by immigrants who had brought the valises and trunks to this country, by Government agents, by two individuals living in Garfield, New Jersey, who testified to the slip-up at the pier in early September of 1960, and by various documents, such as baggage manifests and passenger lists. It is contended that the evidence against at least one defendant, Luigi Lo Bue, rests solely upon the testimony of coconspirator Matteo Palmeri. It is therefore suggested that we ought to review the federal rule that the uncorroborated testimony of an accomplice is sufficient to convict. We hold, however, that the long-standing federal rules does not rquire modification. See *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); *United States* v. *Moran*, 151 F. 2d 661 (2d Cir. 1945); *United States* v. *Schwartz*, 150 F. 2d 627 (2d Cir.), cert. denied, 326 U. S. 757 (1945); *United States* v. *Quinn*, 124 F. 2d 378 (2d Cir. 1941); *United States* v. *Gallo*, 123 F. 2d 229 (2d Cir. 1941). Especially is this principle appropriate in narcotics conspiracy cases, where tangible evidence is often quickly sold or easily destroyed and where conduct and contacts are always furtive. The efficient administration of these vital federal laws could be hampered beyond repair if testimony from

the individuals who know most about the illicit activity was insufficient to sustain a conviction of their co-conspirators. We therefore hold that the circumstance that the chief Government witnesses were formerly members of the conspiracy is a matter which goes merely to the weight of their testimony. Certainly the jury should be carefully instructed as to the weight properly given to "the uncorroborated testimony, inconsistent with his earlier testimony in some respects, of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness." See *United States* v. *Persico*, 305 F. 2d 534, 536 (2d Cir. 1962). Judge Herlands' instruction to the jury was more than adequate on this score. He stated, "The testimony of Palmeri and Rinaldo, who are accomplices by their own admission, must, as a matter of law, be considered by you with close and searching scrutiny and caution." See *Bishop* v. *United States*, 243 F. 2d 32 (D. C. Cir. 1957).

Appellants contend also that the grand and petit juries were improperly selected, and that a motion to dismiss the indictment and a challenge to the array of the petit jury were improperly disposed of by the trial court. Jury lists in the Southern District of New York were drawn in this case from lists of persons registered to vote at presidential elections in the counties of New York, Bronx and Westchester. The contention that this method of selection excludes a legally cognizable group from jury service has been exhaustively treated and completely repudiated in the considered opinion of Judge Bryan in *United States* v. *Greenberg*, 200 F. Supp. 382 (S. D. N. Y. 1961). The quali

fications for federal jury service set down in 28 U. S. C. § 1861[9] are strikingly similar to the requirements for voter registration in the state of New York, see *United States* v. *Greenberg*, *supra*, at 389; the cross-section of society represented by those registration lists is so extensive as to render frivolous the assertion of systematic exclusion. See also *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414 (3d Cir. 1955), cert. denied, 350 U. S. 971 (1956); *United States* v. *Flynn*, 216 F. 2d 354 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

Finally, the appellants as a group contend that the arrest of Rinaldo and Palmeri on October 21, 1960 and the seizure of the narcotics in the false-bottomed trunk, were brought about by information obtained through a wiretap by Westchester County police authorities and transmitted to agents of the federal narcotics bureau. The evidence thus obtained is alleged to be "fruit of the poisonous tree" which has been handed on a "silver platter" from the state to the federal authorities. This contention was asserted below, and Judge Herlands quite properly held an extensive hearing to determine whether the information secured by the state agents through wiretapping had been trans-

[9] "Any citizen of the United States who has attained the age of twenty-one years, and who has resided for one year within the judicial district, is competent to serve as a grand or petit juror unless—

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

mitted to or used by the federal agents in any fashion whatsoever. He concluded that federal authorities "neither received nor used any wiretapping evidence or information derived from the Westchester County authorities or from any other local authorities" and that "the record * * * overwhelmingly supports and sustains the prosecution's contentions." We hold that his conclusions are amply supported by the evidence and are not clearly erroneous. Not only did the state officers sedulously avoid communicating wiretap information to the federal narcotics agents because of a consciousness that such evidence would pollute a federal prosecution, but the record shows that no evidence in any way pertinent to the case at hand was turned up by the taps. Once the defendants offered evidence of the existence of the wiretap, it was incumbent upon the Government to prove that its evidence was not tainted by the tap. *United States* v. *Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950). The Government clearly satisfied this burden; it was not necessary to go further and disclose the precise source from which its information did come.[9a]

Moreover, there is no merit to the appellants' contention that documents containing prior statements by Government witness Rinaldo were improperly used on redirect examination. They fall within the rule of "verbal completeness," and were properly used to place in context state-

[9a] The Government did, in fact, introduce testimony that it had independently secured evidence against members of the conspiracy well before the date of the state wiretap. On September 8, 1959, federal narcotics agent Brown purchased almost $4000 worth of narcotics from Maiello, one of the co-conspirators. The state wiretapping commenced on September 23, and the cooperation of state and federal agents regarding Rinaldo's activities commenced in early October.

ments made on cross-examination. See *United States* v. *Lev*, 276 F. 2d 605, 608 (2d Cir.), cert. denied, 363 U. S. 812 (1960); *United States* v. *Apuzzo*, 245 F. 2d 416, 421-22 (2d Cir.) (en banc), cert. denied, 355 U. S. 831 (1957); 7 Wigmore, Evidence §§ 2094, 2115 (3d ed. 1940); McCormick, Evidence 132 (1954). Also without merit is the contention that the trial judge's entry into the jury room—*with the consent of all counsel*—to inform the jurors that they may leave for lunch, was prejudicial and constituted reversible error. It is undesirable that any information not presented in the courtroom should reach a jury after it has commenced its deliberations, except in those rare instances where all concerned—counsel and the judge—agree that a written communication to the jurors is preferable to bringing them back into the courtroom. But in this instance the judge decided, with everyone's consent, to communicate personally the innocuous message to the jurors. We believe that it would have been wiser had he not, but that it would be "the merest pedantry" to deem his conduct, under the circumstances present here, in any manner prejudicial to the appellants. See *United States* v. *Compagna*, 146 F. 2d 524 (2d Cir. 1944), cert. denied, 324 U. S. 867 (1945).

II.

Having disposed of those grounds urged for reversal which would affect most or all of the appellants, we proceed to the arguments raised by particular defendants in their own behalf.

Appendix A

Cottone's Conspiracy Conviction

Filippo Cottone was indicted and convicted under the conspiracy count of the indictment; he was not charged with any substantive violation of 21 U. S. C. § 174, which proscribes, among other things, facilitating "the transportation, concealment, or sale" of a narcotic drug knowing it to have been imported. Cottone's sole connection with the conspiracy was the assistance he rendered to Matteo Palmeri on September 6 or 7, 1969, when Palmeri was unable to use his bakery truck to pick up the false-bottomed trunk waiting at Pier 84. The Government's case against Cottone may be briefly summarized.

Albert Agueci had told Palmeri that in the event his truck was ever out of order he should contact Cottone. Palmeri did so, informed Cottone that he needed his assistance to pick up a trunk containing narcotics,[10] and promised him $300 for his help. Cottone accompanied Palmeri to the pier, Palmeri signed for the trunk, and both of them loaded it into Cottone's station wagon. En route to Palmeri's bakery, Cottone made the following comments: "You never had any trouble before. How come you all messed up this time? Like your truck is not in order, and you can't find the passenger and all this trouble. I just can't understand how you people operate. It is like a mess." At the bakery, Cottone was introduced to Rinaldo as a man who was "all right"; this was in response to Rinaldo's query whether Mauro and Caruso knew that Palmeri was

[10] On cross examination he testified that he told Cottone "The trunk contains narcoic (sic) on the double bottom of the trunk, so when the inspector opens the trunk we shouldn't worry about nothing."

"taking another man." Cottone participated in ripping open the false-bottom of the trunk, which contained packages of heroin. Cottone left the bakery with one of the blankets taken from the trunk after all of the packages of heroin had supposedly been extracted. When Palmeri later ascertained that there were still three kilograms of heroin in the lining of the blanket, he informed Cottone of this fact and retrieved the blanket. Cottone received the $300 promised him for his services.

We hold that the evidence clearly sustains Cottone's conviction on the conspiracy count. From the testimony summarized above, the jury could have readily inferred that Cottone knew that he was assisting Palmeri in a transaction involving narcotics. But it is urged that although Cottone may have known that the substance imported was narcotics there was insufficient proof from which a jury could conclude that he was aware that the scope of the conspiracy was larger than his instant participation and that there were more conspirators involved. This argument is grounded primarily upon the fact that Cottone was implicated in a single transaction involving only two other individuals.

Several cases decided by this court have held that proof of participation in a single isolated narcotics transaction may be insufficient to warrant a conviction for conspiracy. See *United States* v. *Aviles*, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U. S. 974 (1960); *United States* v. *Stromberg*, 268 F. 2d 256, 267 (2d Cir.), cert. denied, 361 U. S. 863 (1959); *United States* v. *Reina*, 242 F. 2d 302, 306 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v.

Koch, 113 F. 2d 982 (2d Cir. 1940). But, these cases also make it clear that the so-called single-transaction rule is not an arbitrary rule which is to be applied rigidly and without reason. It has been utilized to exonerate a defendant only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred. "A single act may be the foundation for drawing the actor within the ambit of a conspiracy * * *. But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent." *United States* v. *Aviles*, 274 F. 2d at 189. We hold that there is independent evidence from which Cottone's knowledge of the overall conspiracy may be inferred, for he was introduced by Palmeri to Rinaldo, was recommended to Palmeri by Albert Agueci for assistance in these particular circumstances, and was present when Rinaldo referred to Mauro and Caruso. Furthermore, his conversation en route from the pier to the bakery revealed that he was an old hand in the conspiratorial operation; so too did his criticism of Palmeri for failing to locate the passenger bringing in the trunk despite the fact that Palmeri had never mentioned any such passenger to him.

We need not rest on such particularized pieces of evidence, for we further believe that a jury could reasonably infer from the nature of this single transaction itself that Cottone had knowledge of the conspiracy. He went to Pier 84 to assist in procuring a trunk which he knew to

contain narcotics; surely he must have known that the trunk had been imported. He helped to tear open the bottom of the trunk containing blankets in which ten kilograms of narcotics had been secreted. He must have known that such a large quantity of narcotics had not reached their resting place, and the inference is again inescapable that he knew that they would soon be distributed to other illicit purchasers. It was under similar circumstances that this Court found sufficient evidence to support the conspiracy conviction in *United States* v. *Bruno*, 105 F. 2d 921 (2d Cir.), rev'd on other grounds, 308 U. S. 287 (1939).

We have recently held that "From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it . . ." *United States* v. *Aviles*, 274 F. 2d at 190. We hold that there was ample evidence to support Cottone's conviction on the conspiracy count.

PROSECUTOR'S REMARKS IN SUMMATION

Cottone argues that there is still another ground for reversing his conviction. He charges that he was prejudiced by the improper insinuation made in the prosecutor's summation that the lawyer representing both Cottone and Scopellitti had been instrumental in suborning their false testimony. Prior to the trial, Mr. Lewis, who was Cottone's attorney, was requested by the court also to represent the indigent defendant Scopellitti. This he agreed to do. Before this, both Cottone and Scopellitti had made pretrial statements. Their testimony at trial, however, was different

from those statements, and both erected a similar defense.[11] The Government prosecutor, in calling these facts to the attention of the jury, stated:

> "* * * because that is what they told us before, wouldn't you think or you might assume that they are going to give basically the same story again? But then what happened? They are both represented by Mr. Lewis. Both of them take the stand and both of them have almost identical defenses. * * * What a coincidence that is, too * * *."

It is contended that the remark was so prejudicial to both Cottone and Scopellitti that a mistrial should have been ordered and that, on appeal, the defendants' convictions should be reversed.

There is no doubt that the prosecutor's thinly veiled accusation of subornation of perjury on the part of Mr. Lewis was irregular and improper. It would have been appropriate for the trial judge to intercede *sua sponte* in order to caution the jury to ignore the prosecutor's remarks. Such a remark by the prosecutor might, in a case where the evidence against the particular defendants was very tenuous, have caused enough prejudice to be thrust upon the scales of justice, such that they would be tipped

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[11] In his pretrial statement, Cottone denied that he had been at Pier 84 in his car during 1960. Scopellitti, in his statement, said that he had brought only two valises containing personal clothing when he returned to this country. At the trial, both denied material facts contained in those statements and offered exculpatory defenses. Each admitted that he had been at the pier. Cottone said that he had been there mere to help Palmeri pick up a trunk, the contents of which were unknow. to him. Scopellitti testified that he had in fact brought a valise and a trunk from Italy, the latter as a favor for a friend, and that he was unaware of the narcotics concealed in the false bottom of the trunk.

onto the side of conviction; we would then be constrained to reverse and order a new trial. But, although we disapprove of the prosecuting attorney's remarks, we feel that the evidence in support of Cottone's conspiracy conviction was strong enough, and this isolated incident not sufficiently prejudicial in the context of this long trial, see *United States* v. *Stromberg*, *supra*, at 271, to warrant a reversal.

In reaching our conclusion, we further note that although Mr. Lewis, after the entire summation was completed on December 22, 1961, approached the bench "on a point of personal privilege" to ask that the prosecutor's attack be referred to the bar association, there was at that time no formal objection or suggestion that the portion of the summation in question affected the rights of his clients. Nor was a motion then made for a mistrial. Specifically, Mr. Lewis objected to what he considered to be a slur upon his personal integrity. Had a corrective charge been requested, it is likely that one would have been given promptly, for the trial judge was accommodating in that respect—as witness his supplemental instruction regarding the right of the defendants not to take the stand; but no such request was made.

The trial judge instructed all counsel on December 22 to submit in memorandum form on the next trial date, December 26, any motions, objections, or exceptions to the day's proceedings. It is significant that it was not until the latter date that counsel for Cottone and Scopellitti attempted to articulate that the prosecutor's summation was prejudicial to his clients. What must have been confusing to the trial judge, however, was the fact that counsel's written objection (Court's Exhibit XVIII) still appeared

to be mainly concerned with correcting the unwarranted attack on his professional honor. Much the greater part of his objection was directed to the effect which he believed the prosecutor's comments had upon his standing at the bar. The first sentence of the objection asked for a withdrawal of a juror and the declaration of a mistrial "because of the scurrilous attack made upon counsel"; counsel urged in the alternative that if the mistrial be denied the case should be reopened so that he might prove his many years of devotion to and respect at the bar. He coupled this with a request that the prosecutor's accusations be presented to a grand jury and if untrue that they be called to the attention of Chief Judge Lumbard for disciplinary action. He concluded his written objection with the following statement: "This Court is urged to take the necessary steps to inquire into the truth of the prosecutor's remarks so that counsel's good name and his standing as an honorable member of the bar be preserved." It is significant that, despite the formalization of his objection in the written memorandum of December 26, counsel did not even then seek a corrective charge. The judge charged the jury shortly after these objections were voiced. He could with little difficulty have given a corrective charge had counsel requested it and had he not distracted the judge by demands for an investigation of his conduct by the bar association, the grand jury, and the Chief Judge. We are agreed that had a proper corrective charge been given, counsel would have no cause to complain here. See *United States v. Stromberg*, 268 F. 2d 256, 271 (2d Cir.), cert. denied, 361 U. S. 863 (1959). We should not reward him for his failure to make this request.

In any event we choose to reject the assertion of error for the reason that, while the prosecutor's remarks were improper, we do not think they were so prejudicial as to require a new trial. Cf. *United States* v. *Greenberg*, 268 F. 2d 120, 123-124 (2d Cir. 1959); *United States* v. *De Fillo*, 257 F. 2d 835, 840 (2d Cir. 1958), cert. denied, 359 U. S. 915 (1959); *Williams* v. *United States*, 265 F. 2d 214, 216-17 (9th Cir. 1959).

Appellant Scopellitti joins in urging that this incident was prejudicial to him as well, especially, he says, in light of allegedly insufficient evidence to support a finding that he had knowledge that narcotics were contained in the trunk he brought to this country on August 10, 1959. He admits, *arguendo*, to knowledge of the smuggling operation and the false-bottomed trunks, but contends that there is no proof that he knew the substance smuggled was narcotics rather than some other material. We cannot agree. Palmeri testified that Scopellitti and Rinaldos broke open the bottom of the trunk Scopellitti brought to this country and extracted ten packages of narcotics; Scopellitti had earlier reassured his colleagues, "don't worry. I know what it's all about." We hold that the evidence was sufficient to support Scopellitti's convictions for conspiracy and the substantive importation violation of the narcotics law; and, for the reasons already stated, that the prosecutor's attack upon the defendant's counsel did not warrant reversal.

Appendix A

Valachi's Purported Withdrawal from the Conspiracy

Appellant Valachi was convicted on the conspiracy count only. Midway during the conspiracy, on March 28, 1960, he surrendered himself to the United States Attorney for the Eastern District of New York on another violation. He contends that this constituted withdrawal from the conspiracy as a matter of law, and therefore that the trial judge erred in denying his motion for a severance, his request to instruct the jury to disregard as to him the acts and declarations of his co-conspirators after his incarceration, and his motion for a special verdict on the issue of Valachi's withdrawal.

Even if it were true that Valachi's incarceration terminated his relationship to the conspiracy as a matter of law, it is doubtful that the denial of his motion to be tried separately would be reversible error. Under Rule 14 of the Federal Rules of Criminal Procedure, "If it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." We could not hold that the prejudice to Valachi caused by a joint trial with several co-conspirators would, under the circumstances of his case, where we believe an overall conspiracy has been established, make it an abuse of discretion for Judge Herlands to refuse to sever. See *Schaffer v. United States*, 362 U. S. 511 (1960). There was substantial evidence of Valachi's participation in the conspiracy prior to his incarceration, and the significance of

his withdrawal relates only to the improper use against him of subsequent acts and declarations of co-conspirators. Cf. *Cleaver* v. *United States*, 238 F. 2d 766 (10th Cir. 1956).

The law is clear, however, that while arrest or incarceration *may* constitute a withdrawal from a conspiracy, it does not follow that in every instance it *must*. On facts almost identical to those before us, the Court of Appeals for the Sixth Circuit recently held that the defendant's participation in the conspiracy was not terminated. See *Poliafico* v. *United States*, 237 F. 2d 97 (1956), cert. denied, 352 U. S. 1025 (1957). See also *Pinkerton* v. *United States*, 328 U. S. 640, 646-47 (1946). Here, not only was there no conclusive evidence of Valachi's affirmative withdrawal from the conspiracy, see *Hyde* v. *United States*, 225 U. S. 347, 369 (1912); *United States* v. *Stromberg*, *supra*; *United States* v. *Cohen*, 145 F. 2d 82, 90 (2d Cir. 1944), cert. denied, 323 U. S. 799 (1945); *Marino* v. *United States*, 91 F. 2d 691 (9th Cir. 1937), but there was positive evidence that Valachi had in fact designated Porcelli, Guippone, and others to look after his interest in the conspiracy after his incarceration. Since Valachi was to get a share in the profits made on sales by those co-conspirators, there is little question but that he continued to have a stake in the success of the venture.

Certainly the jury could have disbelieved this evidence and found that Valachi had in fact withdrawn from the conspiracy; if he had, then subsequent acts and declarations of coconspirators could not be used against him and he could not be responsible for the acts committed by his colleagues in furtherance of the conspiracy. *Pinkerton*

v. *United States*, *supra*. An instruction to this effect was given[12] and was sufficient to guard against prejudice. While Judge Herlands could, in his discretion, have ordered a special verdict on this issue, it was not an abuse of discretion to refuse to do so.

REPEATED ASSERTION OF PRIVILEGE AGAINST SELF-INCRIMINATION BY PORCELLI.

Appellant Porcelli took the stand in his own defense in order to establish that his dealings with Government witness Rinaldo were not related to any narcotics conspiracy but solely to certain gambling ventures. On cross-examination the prosecutor sought to probe further into the coincidence that these alleged gambling activities would have taken place during the same period as the charged conspiracy; he therefore asked Porcelli whether he engaged in those activities during the years just prior to the period covered in the indictment. To the prosecutor's questions whether he was in the "gambling business" in the years 1959, 1958, and 1957, Porcelli replied that he did not know or did not remember. After a discussion at the bench, the prosecutor reiterated the question regarding the year 1958 and, upon advice of counsel, Porcelli asserted his privilege against self-incrimination. The prosecutor, in a series of seventeen questions, put the same query to Porcelli for the years 1957 back through 1941. Each time, the witness

[12] "* * * if you find that the conspiracy so far concerns Valachi terminated on March 28, 1960, when he was remanded, then and in the event that you so find, any evidence introduced during the trial as to acts, conversations and declarations by other alleged co-conspirators, which occurred after March 28, 1960, should not be considered by you against Valachi."

asserted his privilege against self-incrimination. It is argued on appeal that the prejudice caused by this episode warrants reversal of Porcelli's conviction.

We believe that, although this general thread of questioning might have been relevant in view of Porcelli's direct testimony, the prosecutor's tactics on cross-examination were improper. It is true that the prosecutor was justified in probing the truth of Porcelli's claim that his gambling activities were coincident with the period of the conspiracy, especially in light of Porcelli's halting responses to the first in the string of questions. This was information bearing not only on the factual issues being tried but also on Porcelli's credibility. But questions regarding the earliest years, if answered, would at best have elicited information remote in time from the period of the indictment. Furthermore, it became obvious that Porcelli's response to each ensuing question was certain to be an assertion of privilege. But, no objection was made during the course of the questioning and, especially in the absence of any significant showing of prejudice, we feel that the appellant should be precluded from raising this issue for the first time on appeal. "The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create." *United States* v. *Fire Cases*, 179 F. 2d 519, 523 (2d Cir.), cert. denied, 339 U. S. 963 (1950).

We find appellants' other contentions to be without merit.

Appendix A

III.

This mass-conspiracy case, in presenting us with a great number of difficult problems arising in the course of two months of trial, and in which the record consumed almost 8000 pages, is not untypical of many cases that have come before this Court in the past. It is, therefore, in order for us to concern ourselves with a recurrent feature of this class of case, a feature which often goes undiscussed in judicial opinions. The trial of these multiple-defendant conspiracy cases poses a great problem for the district judge. We recognize that if a narcotics conspiracy is of such dimension as to include a confusing array of defendants, it is inherent in the nature of the crime that the trial is certain to be rather protracted. The great problem confronting the district judge is therefore one of trial management. The jury must constantly be made aware of the fact that there are separate individuals on trial and that each must be judged solely on the evidence properly admissible against him. The difficulties of compartmentalizing the independent evidence in the mass-conspiracy case, and of focussing the attention of the jury on that evidence before consideration may be given to hearsay, are so manifest that we would labor the point were we to say more. But we should call attention to these problems, for in the Southern District of New York there has been a disconcerting increase in the number of indictments and trials involving the mass conspiracy. Judges there are confined for months on end, engaged in trying these cases.

The solution to these problems of judicial administration of the criminal law which we recognize to be difficult

to find, is largely in the hands of the United States Attorney, for he is in a position in the first instance to determine whether it would be more in the interests of criminal justice to restrict the number of defendants tried at any one time. If such were done, then it would be possible to minimize the harassing problems arising from the participation of the great number of separate counsel representing individual defendants, each pursuing his own course in seeking the acquittal of his client. Each counsel, understandably in the mass-conspiracy case, makes a determined effort—which sometimes unfortunately shades into a misguided effort—to distinguish his client from other defendants on trial; he often duplicates matter covered by other counsel, prolongs cross-examination by repetitiveness, becomes more vigorous in his trial demeanor than might ordinarily be proper, and becomes unduly adamant about trial technicalities. Of course the trial judge has a wide discretion to limit needlessly repetitive cross-examination either by the same counsel or by successive counsel and he also may curtail examination which is of doubtful relevance. Some of the cross-examination in this case went beyond the bounds of any possible need and served only to waste the time of the court and the jury. We have observed that these trials do not always steer a staight course toward the determination of innocence or guilt, but are rather excursions into tangential issues, characterized by many side-bar hearings, disruption of the flow of evidence, and other time-consuming tactics. These only add to the extraordinary hardship of the lay juror who, usually, at great inconvenience, takes weeks or months away from his ordinary pursuits in order to fulfil his civic responsibility of jury serv-

ice. We recognize that the defense of an accused in a mass-conspiracy case is a difficult task, but we are certain that the task can be performed with the dignity that brings credit to the judicial process. We remind counsel in such cases that while their task requires them to be partisan they are officers of the court and as such are expected to aid the judge in demonstrating that a trial in an American court is indeed an orderly search for the truth.

It is therefore the responsibility of all concerned in the class of case before us—the trial judge, the United States Attorney, defendants' counsel—to make every effort to resolve the great problems that are raised in this perhaps most difficult area of criminal law administration.

The judgments of conviction as to all of the defendants are hereby affirmed.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 21, United States Code.

"173. IMPORTATION OF NARCOTIC DRUGS PROHIBITED; EXCEPTIONS; CRUDE OPIUM FOR MANUFACTURE OF HEROIN; FORFEITURES.

It is unlawful to import or bring any narcotic drugs into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium or coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs

imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657."

"174. SAME; PENALTY; EVIDENCE.

Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, con-

cealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

APPENDIX C

Exceptions to and Request to Charge

Mr. Krieger: All right, fine, your Honor.

Now, if your Honor please, in describing the substantive counts to the jury and what may constitute substantive counts, I respectfully except to that portion of your Honor's charge where your Honor did not specifically direct the attention of the jury that the existence of the narcotic drug, to wit heroin itself, must be proved as a fact beyond a reasonable doubt.

I further respectfully take exception to (6417) that portion of your Honor's charge wherein with regard to your instructions to the jury in determining by circumstantial evidence whether in fact heroin had been established as a fact by the Government, that the jury should take into consideration a listing of the items suggested by the Government and covered in its request No. 36.

I object to that, your Honor, on the ground that there is a commingling of evidence from various counts to be used in the determination of the existence of heroin and not in regard to any specific count.

I respectfully submit to the Court that as, for instance, an $8500 price paid for a package delivered from Rinaldo has no bearing whatsoever upon my clients and, similarly, the incorporation of other items and the reference to evidence not properly introducible against my clients.

If your Honor please, I respectfully except to those portions of your Honor's charge where in describing the Government's contentions in regard to Counts 8, 16 and 28, your Honor consistently referred to the fact that in two counts three kilograms of heroin had been delivered to

Tandler, and in the course of the Court's charge that four kilograms (6418) had been delivered to Tandler.

I submit that that is a fact to be determined by the jury and that in the general context of your Honor's charge it must of necessity appear to the jury that this fact exists, that heroin was delivered to him when in fact it is something for them to decide.

. . . . . .

(6422) My last exception, your Honor, is that in marshaling the evidence on the substantive counts—as a matter of fact, in marshaling the evidence against my clients, there has been no delineation of the independent competent evidence against either one of them. They have been treated as a unit. Evidence properly admissible against Shiffman is indicated as being properly admissible as against Tandler, and vice versa. There is hearsay stemming from Caruso, from Taubman—no, withdrawn as to Taubman.

There is hearsay from Caruso and from Rinaldo, as well as from Shiffman, which is brought to bear (6423) against Tandler.

And similarly Tandler's statements, which would be hearsay as to Shiffman, are brought to bear against Shiffman.

I do not think that there has been a proper compartmentalization of the evidence, your Honor.

The Court: All right.

Mr. Krieger: My exceptions are noted, your Honor.

The Court: Noted.

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Appendix C

REQUEST NO. 36 ON BEHALF OF U. S. GOVERNMENT
CIRCUMSTANTIAL EVIDENCE OF FACT THAT
SUBSTANCE IS HEROIN

You may find that all of the defendants are guilty of the conspiracy count without concluding that the substance with which they were dealing was a narcotic drug. The reason for that is that in order to prove the conspiracy count all that the Government must show is that there was an unlawful agreement to violate the narcotic laws, that is, "a partnership in crime" and that at least one overt act was committed in furtherance of that conspiracy.

However, you must be convinced that the substance in each of the substantive counts of the indictment was a narcotic drug. I charge you that heroin is a narcotic drug.

The narcotic drug itself need not be produced. It is permissible for the Government to prove the fact that the substance was a narcotic drug by circumstantial evidence. As I have already charged many facts are proved by circumstantial evidence and this fact is in that respect as different from any other fact.

The evidence which the Government has adduced and which you may consider to prove that the substance in the substantive counts was a narcotic drug is as follows:

1. The nitric acid test and the thermometer test conducted by Rinaldo (i.e., 1771, 1795, 1798, 1807, 1815, 1882, 1908, 1929, 1931, 3538, 3322, 3326, 3328, 3335). You will recall that the two Government chemists Messrs. Goldman and Milos testified that heroin turns yellow then green after ten minutes when mixed with nitric acid. They also testified that the boiling point of heroin was a little over 230 degrees.

You will also recall that both chemists testified that the only substance that they knew of which reacted in that way was heroin.

Rinaldo testified that the substance that he was dealing with turned yellow then green in approximately ten minutes. He also testified that the boiling point was approximately 235 degrees.

2. The fact that the entire operation was surrounded with secrecy is evidence of the fact the participants were dealing in heroin. People who import sugar into the country do not do it in false bottom trunks.

3. The fact that the substance in which the participants were dealing was a white powder.

4. The exorbitant price paid for the substance in which the participants were dealing (i.e., $8,500 a kilogram, see p. 1759-62).

5. None of the purchasers complained that the substance which they had purchased was different from that they had contracted to purchase. For example, if a man bought a 1/4 kilogram of sugar for $2,700 thinking it was heroin it is likely that when he discovered that it was sugar he would complain about it.

6. You may use admissions of defendants as evidence that they were dealing in narcotics. The defendant LeBue admitted that the powder in one of the valises that he had was narcotics (p. 183-184a).

The defendant Porcelli referred to the powder as "goods" and he also referred to "doctoring" the "stuff" (p. 1813).

Valachi referred to it as "junk" in the presence of Maiello (p. 1805). Maiello referred to it as "goods" (p. 1821). Maiello also when making for a delivery asked for a "1 4" (p. 1899). Rinaldo discussed the purity of the package with the defendant Palmieri. The defendant asked if the package was good and Rinaldo said that as far as he knew it was (p. 1762). The defendant Palmeri when the next delivery was made asked Rinaldo if the "goods" were as good as the last time and Rinaldo said that they were (p. 1809). Guippone said that at $7,500 there wouldn't be much margin for profit (p. 1814). Shiffman referred to the packages of "junk" (p. 1889-90).

7. You may also consider and there seems to be no dispute that the white powder which has been introduced in evidence in this case is heroin. You will recall that the two chemists Messrs. Goldman and Milos testified that they analyzed the exhibits and came to the conclusion that the exhibits contained heroin.

You will also recall that a chemical analysis was made of Government exhibits 301 through 310 which according to the evidence adduced by the Government, were found in the false bottom of Government's exhibit 6, the trunk. In

addition Government's exhibit 316 which was found in Rinaldo's sister's apartment was analyzed and found to be heroin. Also Government exhibits 325 and 326 which were found in the trap in Rinaldo's home were also analyzed and found to be heroin.

8. The unit of weight as you will recall was a kilogram.

United States v. *Rich*, 262 F. 2d 415 (2d Cir. 1959);

Lebron v. *United States*, 241 F. 2d 885 cert den. 354 U. S. 911 (1st Cir. 1957);

Toliver v. *United States*, 224 F. 2d 732 (9th Cir. 1955);

See also *United States* v. *Brecker*, 242 F. 2d 642 (2d Cir. 1957).

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